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Supreme Court of the United States

OCTOBER TERM, 1958

No. 564

METROPOLITAN SAND & GRAVEL CORPORATION, as owner of the Tugs-METROPOLITAN No. 2 and METROPOLITAN No. 3, and the Sand Scows G-G 202, G-G 150 and G-G 104,

Petitioner,

against

DEEP SEA TANKERS, LIMITED, as owner of the s/t RINCON HILLS, and as bailee of the cargo laden thereon, and SHELL OIL COMPANY, INCORPORATED, as charterer of said vessel,

Respondents.

CROSS-PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Respondents.

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Cross-Petitioner, Metropolitan Sand & Gravel Corporation prays that a writ of certiorari issue to review the judgment in admiralty of the United States Court of Appeals for the Second Circuit in the above entitled matter. The judgment of the Court of Appeals, which was entered on July 14, 1958, reversed a decree of the United States District Court for the Southern District of New York dismissing the libel against petitioner and petitioner's tugs *Metropolitan No. 2, Metropolitan No. 3* and it's sand scows *G-G 202, G-G 150* and *G-G 104.*

The Court of Appeals held that petitioner's tug *Metropolitan No. 2* was liable but granted limitation of liability pursuant to Title 46 U. S. C., Section 183 as to that vessel.

Although the Court of Appeals agreed with the District Court that the tug *Metropolitan No. 3* and the three sand scows were without fault, it entered judgment reversing, in its entirety, the District Court's decree exonerating those four vessels. (Appendix hereto at pp. 49a, 50a).

The Opinions of the Courts Below.

The opinion of the District Court dismissing the libel in *Deep Sea Tankers Limited, et al* v. *The Steamtug Long Branch, et al* (reported in summary in 1956 A. M. C. 1723 and is not otherwise reported), is printed in the appendix hereto (A. 1a-13a).

The opinion of the United States Court of Appeals for the Second Circuit is reported in 258 F. 2d 757 and is printed in the appendix hereto (A. 19a-48a).

The judgment in this matter is reproduced in the appendix hereto (A. 14a-48a).

Jurisdiction.

The decision and judgment of the Court of Appeals for the Second Circuit, sought to be reviewed, were entered on July 14, 1958.

Petitioner filed a timely petition for rehearing, which was denied on September 9, 1958, without opinion.

Jurisdiction of this Court is found in 28 U. S. Code, Sections 1254 (1); 2101 (c), as well as in Rule 19b of the Rules of this Court under this Court's power of supervision over the federal judiciary system.

Questions Presented.

1. Whether the Court of Appeals applied proper standards in holding that the findings of the District Court were clearly erroneous.

2. Whether the Court of Appeals under the standards applied reached the proper result, as to liability, on findings made by it.

3. Whether the Court of Appeals properly reached the question as to limitation of liability.

Statute Involved.

Rule 1, Article 18 Inland Rules of Navigation, 33 U. S. C. 203.

Statement.

Deep Sea Tankers, Limited and Shell Oil Company, Incorporated have filed their petition for certiorari with respect to that part of the decision of the Court of Appeals which granted cross-petitioner, Metropolitan Sand & Gravel Corporation, limitation of liability to the value of the tug *Metropolitan No. 2*, pursuant to the right of limitation set forth in Title 46 U. S. C., Section 183. The present petition is being filed by Metropolitan Sand & Gravel Corporation in order to obtain a review of the merits of that part of the Court of Appeals decision which imposed liability on petitioner and gave rise to the question as to limitation of liability because the findings of the District Court were clearly erroneous.

The trial in the District Court was before the late Judge Henry W. Goddard. The trial began on March 11, 1955 and ended on June 10, 1955, at which time decision was reserved and the parties were directed to file briefs and reply briefs. Judge Goddard died suddenly in August, 1955 before any briefs were filed.

By agreement of all parties the matters involved were submitted to Chief Judge John W. Clancy of the Southern District of New York for decision by him on the record made at the trial, the exhibits, briefs and oral argument, if desired.

Judge CLANCY filed his opinion and decision dismissing the libel and a final decree was entered pursuant thereto.

The respondents appealed from the decision and final decree to the Court of Appeals for the Second Circuit on the ground that Judge CLANCY's findings were clearly erroneous.

The Court of Appeals, in reversing the final decree, held that the findings of the District Court were clearly erroneous, because the Court of Appeals put a different construction upon and made a different interpretation of the evidence.

The Findings of the District Court Were Not Clearly Erroneous.

Respondents filed a libel against petitioner, its tugs *Metropolitan No. 2, Metropolitan No. 3* and its sand scows, to recover damages sustained by the tanker *Rincon Hills* and the cargo laden thereon, as a result of the tanker running aground on Dimond Reef, which is located between the Battery and Governors Island, New York Harbor, N. Y.

The tanker when proceeding from the main ship channel, New York Harbor to the East River, New York Harbor, was proceeding in an easterly direction and on the East River Deep Water Range course between the Battery and Governors Island. The range course would keep the tanker well clear of Dimond Reef, which would be to the right of the tanker and north of Governors Island. Petitioner's hawser tow, made up of the tug *Metropolitan No. 2* and three loaded sand scows, in tandem, was proceeding westerly, south of the Battery and north of the range course. Respondents claimed that to avoid a collison the tanker had to proceed under a right wheel which took her to the south of the range course and toward Dimond Reef.

The District Court held that the grounding of the *Rincon Hills* was due, amongst other faults, to an admittedly wrong right wheel maneuver executed by the wheelsman of the *Rincon Hills* contrary to and in violation of a

proper and usual order given to him by the pilot and second officer of the tanker. The wheelsman was ordered to put the wheel hard left so as to proceed in the normal manner, from the range course up into the East River on a general northerly course. Instead of executing the proper order the wheelsman admittedly put the wheel hard right because he thought there was danger of collision between the tanker and a railroad carfloat tow in no way connected with petitioner.

A hard right wheel would result in the tanker leaving her course by going southerly of the range course and toward Dimond Reef, where she eventually grounded.

The Court of Appeals could not and would not find that the tanker would have grounded even though the hard left wheel order had been properly executed. At the time of the wrong wheel maneuver the court below was unable to determine the position of the tanker with relation to the range course or Dimond Reef.

The Court of Appeals held that at the time of the wrong wheel maneuver of the tanker, danger of collision between the tanker and the railroad carfloat tow had passed. However, the Court of Appeals excused the wheelsman and the tanker, holding that the wrong wheel maneuver was in error in extremis.

In order to avoid the consequences of the admitted wrong wheel maneuver the respondents claimed that the tanker had to proceed under a right wheel in order to avoid a collision. The District Court found that no such action occurred.

The Court of Appeals, in holding that the findings of the District Court were clearly erroneous, summarized the testimony and contentions of tanker pilot Rowohlt as follows:

> The substance of his recital at the trial of the tanker's maneuvers prior to the 'hard left, full ahead' order was: after the single blast he steadied on the Range in a matter of seconds at half speed;

> that 30 seconds after the single blast he sounded the alarm, ordered the engines stopped and gave the right wheel order which was executed, bringing the tanker slightly south of the Range; * * *."

The right wheel order, if given, was given solely to avoid colliding with the carfloat tow. The tanker did not proceed to the right, to the south of the range course and toward Dimond Reef under the right wheel order to avoid petitioner's tow.

Pilot Rowohlt, when testifying to and explaining the claimed right wheel order and the action of the tanker in going to the south of the range course, testified as follows:

> "Q. When you say 'cracked to the south', would you explain a little more what you mean by that? A. Well, in other words, instead of running directly head on to the range, and by opening the red light to the south of the green light, that would bring me off the range, in other words, south of the range, to avoid colliding with the carfloats" (Appendix hereto p. 51a).

The Court of Appeals accepted the pilot's testimony and held that in judging and testing responsibility the final decision rested on the answer to the question—why did the tanker leave the range course? The test of fault was set forth as follows:

> "Accordingly, we must test the question of fault on the part of the tanker by ascertaining what, if anything, Rowohlt could have done to avoid running down the carfloats or coming perilously close to the reef after he sounded the danger signal" (Appendix hereto p. 38a).

The statement sets forth the questions involved not only with respect to the fault or freedom from fault of the tanker, but also the liability or non-liability of petitioner.

The question as to what the tanker could have done to avoid running down the carfloat tow shows that petitioner's sand tow did not cause the tanker to take any action or make any change of course. The respondents' proof clearly shows that the tanker did not change her course to avoid colliding with petitioner's tow.

The question of fault on the part of petitioner's tow is answered by the question posed by the Court of Appeals. The tanker went to the right "to avoid running down the carfloats", not the petitioner's tow and therefore petitioner was without fault.

The question and test of the Court of Appeals completely exonerates petitioner's vessels and shows that the finding and holding of the District Court was not erroneous.

The District Court, in making its finding that petitioner's tow was not in any way involved, stated that it determined that "(t)he liability in this case has been determined largely on the testimony of the libellant's witnesses."

In this connection the District Court found as follows:

> "This fact is found as well in the testimony of the tanker's master which is most important. He ran from his chartroom when he heard the alarm and saw the railroad float off the starboard bow. He never saw the Metpolitan float. If the master of the vessel could not see Metropolitan then it means that tow was never in the picture" (A. 674a-675a).

The Court of Appeals held that this finding was clearly erroneous.

The master of the tanker was a man with 41 years of experience at sea. He had been alerted by the alarm signal sounded by his tanker and he immediately ran into the wheelhouse to make observations in order to ascertain the reason for the alarm signal and what, if anything, was endangering his vessel or interfering with the intended course of his vessel. He observed a railroad carfloat tow ahead off the starboard bow and heading to cross the bow

of the tanker. He also looked ahead and to his left over as far as the Battery. In addition to making observations from the wheelhouse he also made observations from the port wing of the tanker's bridge. He observed vessels and tows to the port of the tanker which were well off the port or left side of the tanker and over towards the Battery. He observed a tow off the port side of the tanker but, due to the fact that this tow was so far to the left of the tanker and in no way endangering the tanker or interfering with its navigation, he did not take particular note of the tow or identify it.

The Court of Appeals held that the Metropolitan sand tow was a "huge, slow moving, cumbersome" flotilla, with an overall length of 500 feet. If such a tow was in close proximity to the tanker *Rincon Hills*, in any way endangering the tanker or interfering with the tanker's intended course, it is clear that the experienced master of the tanker, who had been alerted by an alarm signal, would have observed the Metropolitan sand tow. The fact that he did not observe the Metropolitan sand tow under the existing conditions clearly shows that it was not in the picture, as held by the District Court. It further shows that the tanker did not proceed under a right wheel in order to avoid collision with petitioner's tow. This fact is apparent in the finding made by the Court of Appeals that the tanker went under a right wheel to avoid collision with the carfloat tow, as testified to by the pilot of the tanker (Appendix hereto p. 38a) who was in charge of navigation.

The Court of Appeals in reviewing the testimony of respondents' witnesses held that one of respondents' witnesses testified that he saw the sand tow cross the bow of the tanker as the danger signal was blown (Appendix hereto p. 25a). The Court was referring to Captain McConnell, mate of the tug *William Meseck* which was accompanying the tanker. This witness did not testify to any such fact and when he was asked if he observed the sand tow at the time the alarm signal was blown or if she had disappeared from

view at that time, he testified that he did not have any recollection of the sand tow or whether it was still in view or not (R. 1538, 1539; Appendix hereto pp. 54a, 55a). Neither the mate of the tug *William Meseck* nor any other witness in the case testified petitioner's sand tow crossed the bow of the tanker. Another of libellant's witnesses, the master of the tug *Heyward Meseck*, which was also accompanying the tanker *Rincon Hills*, refused to testify that the Metropolitan sand tow crossed the bow of the tanker (Appendix hereto p. 53a).

The District Court held that the helmsman's wrong wheel maneuver, which was contrary to the specific orders of the pilot and the 2nd officer of the tanker, was negligence and caused and contributed to the grounding.

The Court of Appeals held that this finding and holding was erroneous and that the admittedly wrong wheel maneuver was an error in extremis.

In its reasoning leading up to this conclusion the Court below found that at the time of the wrong wheel maneuver the possibility of collision had passed and that the order of the pilot for hard left was proper. It further found that if the order of the pilot had been properly executed it was possible that the grounding of the tanker would have been avoided.

The findings of the Court of Appeals show that an extremis situation did not exist at the time the helmsman executed the wrong wheel maneuver, contrary to specific orders and instructions. The findings show that there was not danger of collision between the carfloat tow and the tanker at the time her wheel was put to the right instead of to the left, because the carfloat tow was clear of the stem of the tanker and the court admitted that there was a possibility that the stranding would have been avoided had the wheelsman done as he was told. The court found that an extremis situation existed because the helmsman *thought* that one existed when it did not exist in fact because the carfloat tow was clear of the stem of the tanker

and she could have proceeded straight ahead without the possibility of collision.

An error in extremis was not committed in this case and the act of the wheelsman in disobeying orders under the facts as found by the Court of Appeals was nothing less than gross negligence on the part of the wheelsman. The wheelsman was not in a position to or required to exercise his discretion or judgment as to the manner in which the tanker should be navigated. The only two men on the bridge at the time of the occurrences involved who had the right and the obligation to exercise their discretion or judgment as to navigation were the pilot and the master of the tanker. The master, of course, had the authority at all times to overrule the orders of the pilot if in the master's judgment the pilot's orders would result in improper navigation.

In defining an error in extermis Justice LEARNED HAND in the case of *A. H. Bull S. S. Co.* v. *United States,* 2 Cir., 34 F. 2d 615 at page 616, held as follows:

> "Even in extremis, * * * some discretion is demanded; the phrase means no more than that less judgment is required in an emergency than when there is time to consider; it does not exculpate all faults; it is no more than a palliative."

The position of the wheelsman did not entail, demand or require that he exercise his discretion or judgment. His sole obligation was to obey the orders of the pilot and the 2nd officer. His disobedience of a specific order, which he admittedly acknowledged that he understood, cannot be called an error in extremis. The holding by the lower court as to the act of the wheelsman being an error in extremis opens the door for every disobedient seaman to claim that he was not disobedient nor negligent because when he deliberately failed to carry out the orders of his superiors he was acting in extremis. Such a ruling should not be permitted to stand. The foregoing shows that the

District Court was not clearly erroneous in its holding in this respect.

The Court of Appeals below found that "when the single blast signal was given the intended course of the two tows could not have been known by Rowohlt." The record clearly shows that pilot Rowohlt knew the position and course of the Metropolitan sand tow at the time of the one-whistle signal. The finding of the court below is directly contrary to the testimony of the pilot, even though the court stated it accepted his testimony (Appendix hereto p. 34a).

Pilot Rowohlt's Coast Guard testimony, as the course and destination of the Metropolitan sand tow, is as follows:

> "Q. And what position were you in when you gave the one blast signal to the tow? A. We were on the range but not up to it. We were not abeam yet of the northwest corner of Governor's Island.
>
> Q. What was the position of the tow? Where was that located? A. They were about abeam of the ferry, South Ferry that is, heading in a northwesterly direction."
>
> • • • • •
>
> "Q. And he was on the left side of the river, on his left? A. That would be on his right side of the river.
>
> Q. And how far off the pierheads was he? A. He was fairly in the middle.
>
> Q. Where did he appear to be bound? A. Well, I took it for granted he was bound for the stakeboats in Jersey City, and the Jersey Central also bound for Jersey City" (Appellant's App., pp. 793a-794a).

This testimony shows that the pilot knew the course and destination of the sand tow before he blew the one blast signal as that tow had proceeded to the right previous to the signal and was on its course to go around the Battery at the time the one blast signal was sounded. It further shows that as the carfloat tow had not started to swing to

the right the tanker pilot sounded his one blast signal to the carfloat tow indicating that the pilot wanted the carfloa tow to swing to the right and proceed on a course similar to the sand tow's so that a port to port passage could be carried out, as was being done by the sand tow. When the carfloat tow did not answer with a one blast signal the pilot sounded the alarm to wake up that tow (Met. App. 2).

Pilot Rowohlt's trial testimony on this point as to the Metropolitan sand tow is as follows:

> "Q. How long after that was it that you gave the one blast signal? A. After the first sighting?
>
> Q. Yes. A. Oh, I don't know. It may be a minute or two" (R. 339).
>
> • • • • •
>
> "Q. Why did you wait the interval you did at the time you first observed the tugs and tows until the time when you blew your one short whistle signal. A. Well, I waited for a decision because we weren't on head and head or anywheres near so. So I waited until I could make an estimation of which way they were going to head. At the first sighting there was such a difference in the headings that anything could be decided beforehand and, therefore, I couldn't make a decision which way they were going.
>
> Q. By that, then, do you mean that you waited until you reached that decision before you gave your one-blast whistle signal? A. That is right" (R. 373-374; Met. App. 2-3).
>
> • • • • •
>
> "Q. Captain, at the time you blew the one-whistle signal on the Rincon Hills and the two tows were in the position you have described and shown in the chart, at that time in your opinion could you safely have blown a two-whistle signal and proceeded accordingly? A. No, sir.
>
> Q. Why not? A. Well, the sand tow was—the head tow—was already heading in a westerly direc-

tion and I couldn't possibly go to the left on a two-whistle basis because he is so far to the left that if I was to continue on a course of such, I would have collision with the sand tow." (Appellant's App. 47a).

From the foregoing testimony of the pilot there cannot be any question of the fact that the District Court was correct and that the Court of Appeals incorrectly held that the pilot did not know the intended course of the sand tow. The pilot repeatedly testified that he knew the course of the sand tow and also testified that he knew the sand tow's destination. The fact that he knew the intended course of the sand tow is emphasized by his testimony that he did not sound a one-whistle signal until he could definitely ascertain what the intended course was. Despite the repeated statements of the pilot of the tanker the Court of Appeals held that he could not have known the intended course of the sand tow.

Reasons for Granting the Writ.

1. Respondents' petition raises the question as to petitioner's right to limit liability as granted by the Court of Appeals. The court below, in arriving at and in granting petitioner limitation of liability, considered the merits of the case. After considering the merits of the case it reversed the findings of the District Court as being erroneous. It did so under the well established rule that an appeal in admiralty was a trial de novo. It decided that one of petitioner's vessels was negligent, which gave rise to the question as to whether or not petitioner was entitled to limitation.

When respondents question in part the decision of the court below as to the granting of limitation to petitioner, this petitioner should be entitled to present to this Court the question as to whether or not the court below properly reached the question as to whether or not the right of limitation of liability was involved in the case. On a hearing be-

fore this Court on a writ of certiorari this Court stands in the same position as the Court of Appeals, when that court was considering the merits of the case with respect to the question as to whether or not the District Court's findings were clearly erroneous. In *McAllister* v. *United States*, 348 U. S. 19, it was held that in relation to the District Court's findings this Court stood in review in the same position as the Court of Appeals in an admiralty action. The question as to whether or not the Court of Appeals was correct in holding that the findings of the District Court were clearly erroneous was considered.

If the petition of respondents is granted, then this court should consider the merits of the case in order to determine whether or not the question of petitioner's right to limit was properly arrived at and considered by the Court of Appeals. *Rogers* v. *Missouri Pacific R. R. Co.*, and two other cases, 352 U. S. 559, 1 L. Ed. 515.

In order for petitioner herein to properly obtain relief from the erroneous decision of the court below when it decided that the question of limitation of liability was involved in the action because the District Court's findings were clearly erroneous, it is necessary that the petitioner have a writ of certiorari. *Morley Construction Co.* v. *Maryland Casualty Co.*, 300 U. S. 185; *LeTulle* v. *Scofield*, 308 U. S. 415.

As this court, when hearing a writ of certiora · considers the merits of the case involved, petitioner should not only be heard in this respect but should be permitted to ask for relief on the merits and unless it has its own writ of certiorari it cannot ask for or obtain relief to which it is entitled.

2. The Court of Appeals did not adopt or apply correct or appropriate standard of review as to petitioner. The District Court found that all of the petitioner's vessels were without fault and specifically, with respect to the tow in charge of the tug *Metropolitan No. 2*, found that that

tow "was never in the picture" (Appendix hereto p. 11a). The District Court stated that it based its findings largely on the testimony of libellant's witnesses (Appendix hereto p. 9a). The Court of Appeals held that the District Court was clearly erroneous with respect to petitioner's tow in charge of the tug *Metropolitan No. 2.*

The Court of Appeals, in considering whether or not the tanker was at fault, stated that it had to test the question of fault on the part of the tanker by ascertaining what, if anything, the tanker could have done to avoid running down the carfloats or coming perilously close to the reef. It is inherent in the question which the court posed to itself that it was not necessary for the tanker to take any action because of petitioner's tow. Any actions taken by the tanker were solely for the purpose of avoiding collision with the railroad carfloat tow. The test and the question posed by the Court of Appeals is based on the testimony of the pilot of the tanker and at one time he ordered a right wheel to leave a safe course on the range to avoid collision with the railroad carfloat tows. He did not testify that he ordered a right wheel to avoid collision with petitioner's tow. Despite the standard set up by the Court of Appeals, which solely involved the tanker and the railroad carfloat tow, the Court of Appeals proceeded to include petitioner's tow in the test and standard and apply the same to petitioner's tow unwarrantedly.

The question which the Court of Appeals posed to itself was in accord with the holding of the District Court, that petitioner's tow was no way involved in any action taken by the tanker to avoid collision with the railroad tow. Yet, the Court of Appeals went on to find that petitioner's tow was at fault and that the District Court was clearly erroneous. In doing so it did not apply the appropriate standards as required by this court in so far as petitioner's tow was concerned. This is further shown by the testimony of the wheelsman of the tanker when he claimed that he

executed the admittedly wrong maneuver, by going to the right instead of the left, he did so solely for the purpose of avoiding a collision with the carfloat tow. This witness for the libellant at no time claimed that he went to the right and toward Dimond Reef in order to avoid petitioner's tow.

The Court of Appeals committed error in not applying the appropriate standard and thereby concluded that petitioner's tow was at fault.

The master of the tanker who had been alerted by an alarm signal sounded by his vessel immediately began to make extensive observations. He observed the railroad carfloat tow ahead but at no time did he observe petitioner's tow, which the Court of Appeals held was a large and cumbersome tow (Appendix hereto p. 18a). With respect to this evidence of respondents the District Court held that he, the master, did see the railroad float but that "he never saw the Metropolitan float. If the master of the vessel could not see Metropolitan then it means that that tow was never in the picture" (Appendix hereto p. 11a).

The Court of Appeals held that this finding was erroneous and the fact that the master of the tanker did not see petitioner's float had no bearing in so far as the position or presence of petitioner's tow was involved in the case. Here we have the application of an improper standard which led the Court of Appeals to hold that the findings of the District Court were erroneous.

3. The Court of Appeals in excusing the tanker and the wheelsman for the wrong wheel maneuver held that it was an error in extremis (Appendix hereto p. 39a). The respondents' witnesses admitted the wrong wheel maneuver which was executed after the tanker pilot had given the proper order which was repeated by the officer on watch and also repeated and acknowledged by the wheelsman. The wheelsman was not in a position where he was required or permitted to exercise any discretion or judgment as to the navigation of the tanker.

In the case of *A. H. Bull S. S. Co.* v. *United States*, 2 Cir., 34 F. 2d 615, at page 616, Justice LEARNED HAND held as follows with respect to an error in extremis:

> "Even in extremis, * * * some discretion is demanded; the phrase means no more than that less judgment is required in an emergency than when there is time to consider; it does not exculpate all faults; it is no more than a palliative."

It is clear that the Court of Appeals in reversing the District Court applied an improper standard because the position of the wheelsman did not entail, demand or require that he exercise his discretion or judgment as to the navigation of the tanker. It was solely the duty of the pilot of the tanker or the officers of the tanker to exercise their discretion or judgment as to navigation. Such judgment had been exercised and it was the sole obligation of the wheelsman to obey the orders of his superiors. Under the holding of the Court of Appeals we now have a ruling which will permit any disobedient and negligent seaman to claim that he was acting in extremis when he failed to carry out proper orders and instructions.

That an error in extremis was not involved is shown by the holding of the Court of Appeals, that at the time of the execution of the wrong wheel maneuver a possible collision situation did not exist as danger of collision had passed (Appendix hereto p. 20a).

4. The Court of Appeals held that a head and head situation existed between the tanker and petitioner's tow at the time the tanker sounded her one-whistle signal, and applied Rule 1, Article 18 33 U. S. C. Sec. 203 and the Pilot Rules for Inland Waters, 33 C. F. R. Sec. 80.03. The basis of the holding that a head and head situation existed between petitioner's tow and the tanker was based on the testimony of the tanker pilot before the United States Coast Guard. This testimony is contained in Respondents'

Exhibit 10. A reading of the testimony shows that at the time the tanker pilot testified as to a head and head situation he was referring to the situation which existed between the tanker and the railroad carfloat tow and was not referring to petitioner's tow. This testimony is as follows:

> "Q. The tow with the carfloats was approximately on the range ahead of you? A. It was about on the range, yes, sir.
>
> Q. And the situation you had with them was one of meeting head and head? A. At the time, yes, sir" (Appellants App., p. 795a).

On the trial not one witness from the tanker, including the pilot, contended that a head and head situation existed at any time between the tanker and petitioner's tow. The pilot of the tanker testified that when he observed petitioner's tow it was not a head and head situation "or anywhere's near so" (Met. App. 2-3).

Respondents expert, Captain Gow, testified that the situation, as contended by the tanker pilot and other witnesses of the libellants, did not involve a head and head situation (Met. App. 59-60, 67). In applying the standard of a head and head situation to petitioner's tow the court below committed error. The only head and head situation involved was that between the tanker and the railroad carfloat tow, which was testified to by the pilot during the Coast Guard investigation.

The holding of the court below in the present case is in conflict with its holdings in the cases of *Construction Aggregates Co.* v. *Long Island R. Co.*, 105 F. 2d 1009; *Tucker* v. *Socony No. 9*, 167 F. 2d 685, and *The Delaware*, 66 F. 2d 467. It is also in conflict with the holding in *United States of America* v. *Steamtug William H. McAllister*, (SDNY) 110 F. Supp. 745.

The court below committed further error when it held that the tanker had the right to sound a one-whistle passing signal to two approaching tows. There is no provision in

the rules for such a passing signal. On the respondents evidence it is clear that when the tanker sounded her one whistle signal it was just a general information signal as to her intent to change her course to starboard so as to proceed on the range course, as testified to by the tanker's second officer and as found by the District Court (Appendix hereto p. 5a), which finding was held to be erroneous. If it was not a general information signal but a passing signal then the tanker was sounding that passing signal to the railroad carfloat tow, as the only contention of the pilot as to a head and head situation was with respect to the railroad carfloat tow, as testified to by him during the Coast Guard investigation.

The court below held that the single blast signal of the tanker was not a general information, courtesy or warning signal because the rules did not provide for such a signal. That an information or courtesy signal, not specifically provided for by the navigation rules has been recognized, is shown by the case of *Ira S. Bushey & Sons, Inc.* v. *Standard Oil Co. of Cal.*, (EDNY) 99 F. Supp. 63, affirmed with opinion, 2 Cir., 197 F. 2d 788.

When the tanker turned to the right to leave the main ship channel so as to proceed over to the East River she sounded a one blast signal to show her intention not to continue on up the North River but her intention to proceed toward the East River. In Title 33 C. F. R. Sec. 80.03, cited by the court below, it is provided with respect to a single blast signal, as follows:

> "One short blast of the whistle signifies intention to direct course to own starboard, * * *"

The Inland Pilot Rules clearly show that a vessel may make her intent known by sounding a signal. When a single blast is blown this gives all other vessels the information as to the intended course of the vessel sounding the signal. The giving of information by a vessel as to her intended course is specifically provided for in the rule.

The court below held that petitioner's tow was required to sound a one-whistle passing signal. Sec. 80.03 of Title 33 C. F. R. did not impose any obligation on petitioner's tow to sound a passing signal. Petitioner's tow was not required to sound a passing signal under Title 33 U. S. C. Sec. 203 because petitioner's tow and the tanker were not in a head and head situation.

CONCLUSION.

For the foregoing reasons this cross-petition for a writ of certiorari should be granted.

Respectfully submitted,

LEO F. HANAN,
CHARLES J. CARROLL, JR.,
Counsel for Petitioner,
99 John Street,
New York 38, N. Y.

APPENDIX

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

Docket Nos. A. 171-47, A. 173-80, A. 173-81, A. 173-82, A. 175-68

DEEP SEA TANKERS, LIMITED, in its own behalf as owner of the Steamtug RINCON HILLS, and as bailee of the cargo laden thereon and SHELL OIL COMPANY, INC., as charterer of said vessel,

Libellants.

—against—

The Steamtug LONG BRANCH, the Railway Carfloats No. 61 and No. 56, CENTRAL RAILROAD COMPANY OF NEW JERSEY, the Steamtugs METROPOLITAN No. 2 and METROPOLITAN No. 3, the Sand Scows GG-202, GG-150 and GG-104 and METROPOLITAN SAND & GRAVEL CORPORATION,

Respondents.

In the Matter of the

Petition of the CENTRAL RAILROAD COMPANY OF NEW JERSEY, as owner of the steam tug LONG BRANCH, for exoneration from or limitation of liability.

In the Matter of the

Petition of the CENTRAL RAILROAD COMPANY OF NEW JERSEY, as owner of the carfloat known and designated as CRR OF N. J. No. 56, for exoneration from or limitation of liability.

In the Matter of the

Petition of the CENTRAL RAILROAD COMPANY OF NEW JERSEY, as owner of the carfloat known and designated as CRR OF N. J. No. 61, for exoneration from, or limitation of liability.

ATLANTIC STEVEDORING CO., INC.,

Libellant,

—against—

The Tanker RINCON HILLS, her engines, etc., and DEEP SEA TANKERS, LIMITED,

Respondent,

—and against—

The Tugs METROPOLITAN No. 2, METROPOLITAN No. 3 and LONG BRANCH, the Scows GG-202, GG-150 and GG-104; and Carfloats CRR OF N. J. No. 61, and CRR OF N. J. No. 56,

Respondents-Impleaded,

—and against—

METROPOLITAN SAND AND GRAVEL CORPORATION and THE CENTRAL RAILROAD COMPANY OF NEW JERSEY,

Respondents-Impleaded.

OPINION

JOHN W. CLANCY, U. S. D. J.

MESSRS. HAIGHT, GARDNER, POOR & HAVENS,
80 Broad Street,
New York 4, N. Y.

Proctors for Libellants Deep Sea Tankers Limited, as owners, and Shell Oil Company, Incorporated, as charterers, of the s/t RINCON HILLS,

CHARLES S. HAIGHT, ESQ.,
ROBERT M. JULIAN, ESQ.,
GORDON W. PAULSEN, ESQ.,
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VINCENT E. McGOWAN, ESQ.,
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VINCENT E. McGOWAN, ESQ. and
GERALD J. McKERNAN, ESQ.,
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MESSRS. MACKLIN, SPEER, HANAN & McKERNAN,
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LEO F. HANAN, ESQ. and
CHARLES J. CARROLL, JR., ESQ.,
of Counsel.

MESSRS. HILL, RIVKINS, MIDDLETON, LOUIS & WAREURTON,
Proctors for Atlantic Stevedoring Co. Inc.,
96 Fulton Street,
New York, N. Y.

THOMAS H. MIDDLETON, ESQ., and
ALLAN B. LUTZ, ESQ.,
of Counsel.

CLANCY, D. J.

This proceeding involves five related suits, all arising from the grounding of the tanker RINCON HILLS on November 26, 1951. They were consolidated for trial. The owner and charterer of the RINCON HILLS filed a libel against

Metropolitan Sand & Gravel Corporation, two tugs and three sand scows owned by Metropolitan, and against Central Railroad of New Jersey, a tug and two carfloats owned by it. Metropolitan answered the libel as respondent and as claimant of its vessels. Central Railroad of New Jersey did not answer the libel but instead filed three separate petitions for exoneration from and/or limitation of liability on behalf of each of its three vessels named in the libel. The fifth related suit was a libel brought by Atlantic Stevedoring Co., Inc., against the RINCON HILLS and its owners, in which the tugs owned by Metropolitan and the Jersey Central were impleaded.

FINDINGS OF FACT.

1. Shortly after noon on November 26, 1951 the tug METROPOLITAN No. 2 owned by the respondent Metropolitan Sand & Gravel Corporation, proceeded south in the East River. Her tow consisted of the three respondent scows loaded with sand, made up in tandem fashion close to each other. It was towed on two hawsers about 100 feet long. The tow thus had an overall length of 500 feet. The tug had 650 horse power. The tow was proceeding down river favored by the last of the ebb tide and in clear weather. When off pier 8, New York, the tug's master perceived the RINCON HILLS, a tanker, then about 1000 feet west of the light at the northwest corner of Governors Island. The METROPOLITAN No. 2 at that time was about 400 feet off the piers and at this point it began to pull in to starboard to South Ferry to proceed around the Battery. The Manhattan shore at this point veers sharply to the west so that his starboard wheel did not diminish its distance from the pier ends. When off pier 4 with her tow following relatively straight behind, the tug captain heard a one-blast signal from the RINCON HILLS. He did not answer, assuming from the respective positions of tanker and tow that the blast was not intended as

a signal directed at him. He proceeded to and around the Battery and into the North River, maintaining a distance of approximately 500 feet between his tug and tow and the pier line and the Battery Sea Wall.

2. Coming down river at the same time was the Central Railroad of New Jersey tug LONG BRANCH with a tow consisting of two car floats, one made up on either side. Each of the floats is 290 feet long on deck with a beam of 40 feet, without means of propulsion or control. One float was empty. The other float had on her middle track near her bow, two empty steel coal cars and a loaded box car. The bows of the floats were made fast close together so that the tow was approximately 80 feet wide at the bow and 115 feet at the stern. Passing piers 8 and 9 on her way down river, the tow was something more than 500 feet off the pier ends. Below pier 9 it angled to starboard toward the Battery. When it was off pier 9, its pilot noticed the RINCON HILLS down in the bay and then initiating a right turn. When the LONG BRANCH tow reached pier 5 it was 700 feet off the pier end because though she was moving to starboard the Manhattan shore angle of recession was greater than the angle of her course. When the LONG BRANCH tow was below pier 5 and its direction was westerly, the RINCON HILLS blew a single blast of her whistle. This whistle was not addressed to the LONG BRANCH or to any particular vessel but was only to warn all traffic in the East River of the RINCON HILLS' approach. The LONG BRANCH did not answer the whistle and this omission was in no respect negligent since the LONG BRANCH was not on a crossing course with respect to the RINCON HILLS nor head to head nor on any other course that required a signal. The LONG BRANCH tow negotiated her right turn into the Bay, behind and to the port of the sand tow. In the course of this turn she passed the RINCON HILLS which was then on the Range,

port to port about 200 feet off her bridge, near the long rack at South Ferry. She then proceeded to her destination in Jersey City.

3. The tanker RINCON HILLS, 523½ feet long and 68 feet beam, had come north from the quarantine anchorage in the control of a tug captain acting as pilot. She was making ten knots an hour when she arrived at the northwest corner of Governors Island where the pilot started a right turn to put himself on the Range intended to direct deep vessels away from the Dimond Reef north of Governors Island. Making this turn reduced the vessel's speed one knot so that at its conclusion she was running nine knots an hour and her heading was being held ten degrees to the left of the Range in order to avoid the expected effect of the ebb tide. Half way through this turn the captain blew a single blast intended to advise the traffic in the East River of his arrival and intent to navigate into the River. In the position of his heading at the time he blew this blast, any traffic in the East River, south of pier 5, more than 350 feet off the pier ends, would be to his starboard bow. He saw the LONG BRANCH tow in that relative position and blew four short blasts, intended, to use his own language, to take in "whatever was on the port side. It was a warning because they weren't giving me any break at all so far as the room was concerned." The four blasts were also an expression of his acute apprehension upon his realization of his own excessive speed. Immediately after he stopped his engines and ran two minutes with the engines stopped and with the ship heading under an amidships wheel steady on the deep water Range when he had made it. The stopping of his engines had had no more effect that reducing his speed less than one knot and the tide may possibly have had some effect also so that after the two minutes running without power, the tanker was still moving at a speed of

at least 7½ knots. The LONG BRANCH tow had by that time passed to his port and when it was opposite his bridge he ordered his engines full ahead and his helmsman to go hard left. This order was given at precisely the point where he, an experienced docking pilot, always turned left from the Range. The engines were put full ahead but unfortunately the helmsman turned the wheel a full sharp hard right and the RINCON HILLS, to use the expressive colloquialism of a tug captain, "took a nosedive" to starboard and ended up on the reef one and a half minutes after the full ahead order for the engines was effectuated.

4. The LONG BRANCH and the RINCON HILLS were never in a crossing position or in a head to head position or in any position that required a navigating signal from the LONG BRANCH. When two vessels are moving in opposite directions on adjacent arcs there comes upon each of them an instant when its head is directed at the other vessel. The RINCON HILLS never had the slightest doubt about the course of the LONG BRANCH and even if the LONG BRANCH were deemed at fault at failing to whistle a signal to the RINCON HILLS, such failure did not contribute in the slightest to the tanker's navigation or grounding.

5. The respondent tug, METROPOLITAN No. 3, had pursued the respondent METROPOLITAN No. 2 and its tow down the river, around the Battery and in the North River disengaged one of the scows from the tow, in accordance with an agreement made between the pilots of the tugs though the office had directed the METROPOLITAN No. 3 to put off the scow further down the Bay. Its performing its task in the North River did not have any effect whatever on the speed or the course of the METROPOLITAN No. 2 which has been found faultless.

6. Attending the RINCON HILLS were two tugs owned by the same owner, one of which had furnished the pilot of

the RINCON HILLS. That tug had proceeded north from quarantine and mid-way in the bay it went on the port side of the RINCON HILLS and was promptly ordered to resume its position to the tanker's starboard. The other tug had waited fifteen minutes for the arrival of the RINCON HILLS from a position 500 feet off the Battery Sea Wall. It was the intended job of both these tugs to assist the RINCON HILLS in negotiating its turn into the river and hold her up in the ebb tide as well as to control her sluggish steering. The RINCON HILLS pilot used neither.

7. The grounding of the RINCON HILLS was due entirely to the faulty navigation of the pilot in charge, his failure to exercise due care in earlier reducing her speed, his failure to use properly the tugs supplied for his use by the owner of the RINCON HILLS, the grossly negligent allowance of the helmsman's erroneous maneuver, and the failure of the officers in or near the pilot house timely to notice the helmsman's error when it occurred or until correction of it was too late. The RINCON HILLS never at any time navigated with respect to the METROPOLITAN tow. There was nothing in the conduct of the LONG BRANCH tow that contributed in any way to the grounding. That tow was handled with all due care with respect to itself and to the RINCON HILLS.

8. Before November 28, 1951, two days after the stranding of the RINCON HILLS, the Atlantic Stevedoring Company was engaged on the steamships TULANE and TRAFALGAR at piers 36 and 37, Atlantic Basin. Some of its cargo nets dangled in the waters of the Basin which became covered with oil. By order of the Fire Department the ropes were destroyed and the libellant, Atlantic Stevedoring Company suffered the loss of their value. The Court has reached the conclusion that identification

of the oil as that from the tanker RINCON HILLS was not established and foreseeability and causation by the tanker's neglect are doubtful.

CONCLUSIONS OF LAW.

1. The libel of Deep Sea Tankers, Limited and Shell Oil Co. Inc., as owners and charterers of the RINCON HILLS, is dismissed as to all respondents named therein, with costs to the respondents Metropolitan Sand & Gravel Corporation and METROPOLITAN No. 3.

2. The petitions for exoneration from liability of the tug LONG BRANCH and the carfloats No. 56 and No. 61 are granted, with costs to the Jersey Central.

3. The libel of Atlantic Stevedoring Co., Inc. against the tanker RINCON HILLS and Deep Sea Tankers, Limited, is dismissed with costs and the impleading petitions against the Jersey Central and Metropolitan tugs are dismissed without costs.

The liability in this case has been determined largely on the testimony of the libellant's witnesses. When the RINCON HILLS pilot testified before the Coast Guard eight days after his vessel's grounding, he was subject to every impulse and inducement to find a reason for the deviation from his course that resulted in his vessel reaching the reef. He never gave any reason for it except the helmsman's disobedience or mistake that resulted in his hard left wheel order being executed by a hard right wheel with his engines at full speed ahead. At that hearing his own counsel supplied him numerous leads to complain about the railroad car float. He rejected all of them and persisted from beginning to end in testimony that was well summarized by his own statement: "She didn't go hard left. That's all I know." That the railroad float had passed him relatively long before the giving of his hard

left order is demonstrable from his own testimony and from the charts which he marked and upon which he fixed the vessels' positions at different times. When he gave the alarm signal he fixed on a chart the position of the railroad float 2800 feet in front of him. The Court is not inclined to hold witnesses to exactness when marking a chart, but the pilot was the only witness who could testify to the position of the car float tow when he blew the alarm so we are accepting his testimony as his approximation of the distance between the tanker and the tug. Thus the pilot's drawing indicates a crossing of the Range to the east by the LONG BRANCH when the single blast was blown and crossing back to the west when the alarm was blown, he says, thirty seconds later. This seems to the Court an impossibility and renders both whistle signals unintelligible. Returning to the position of the float when he blew the alarm, his testimony is that at that point he then stopped his engines. Two minutes afterwards he gave the left wheel order. We put his speed at 7½ knots which he was certainly doing and he had passed the railroad float before giving the left wheel order. The speed of the railroad float we have calculated from the time of its start and of its reaching Jersey City. We have allowed 5 miles per hour at the foot of the East River and in the two minutes between the alarm signal and the left wheel order of the RINCON HILLS, the car float would have gone 900 feet on an arc from and below pier 4. This would have put her down near the long rack at South Ferry and passing the RINCON HILLS there as we have found. This agrees with the testimony of the LONG BRANCH captain whereas any supposition that the LONG BRANCH had crossed the Range and returned would require a matter of at least two minutes more to put the LONG BRANCH in that position. This fact is found as well in the testimony of the tanker's master which is most important. He ran from his chartroom when he heard the alarm and saw

the railroad float off the starboard bow. He never saw the METROPOLITAN float. If the master of the vessel could not see METROPOLITAN then it means that tow was never in the picture. How and why he saw the railroad float has been shown. He watched the railroad float approach and pass on the port side of his vessel without asserting his authority in any way. If his vessel was in any danger from the tow he would certainly have suggested or taken measures to avoid it. It never was in danger from the tow. The master's statement by the way that this vessel was always swinging cannot be made to accord with the midships rudder. The tanker's speed is confirmed by her pilot and by the only relevant portion of the testimony of the experts produced by the libellant. When all their testimony is digested, her speed at the time of the hard left order was put at about seven and one-half knots.

Despite his failure to deny or distinguish any of his answers to interrogations before the Coast Guard, the pilot changed the substance of his testimony at the trial. We refer especially to his alleged movement to starboard after the alarm and before he put his rudder midships. This is not accepted because it is an outright contradiction of his original testimony at the Coast Guard hearing and of its repetition by asserting the truth of that testimony at the trial. The helper tugs which were never employed by the RINCON HILLS pilot were there to assist in effecting a safe turn into the East River. This is evident from the fact that when the attending tug took up a position on the vessel's port during its progress up the Bay, it was ordered to the starboard side by the pilot. The other tug waited fifteen minutes either off the Battery or at a dock there as one witness put it. There is no explanation for the presence of the two tugs with the tanker at the Battery except that they were furnished for use by the pilot to manage the turn into the river of this admittedly deep-laden and sluggish vessel. The testimony

of the attending tug's pilot confirms every finding we have made and the overall testimony of the other tug's master we regard as in accord.

The testimony of the libellant's experts, except in as much as they established the speed of the RINCON HILLS, is unimportant because all of it was incorporated in a wholly irrelevant hypothetical question which presented to the Court a hypothetical case only and not a navigating problem of the RINCON HILLS. Without accentuating any of its other deficiencies, such as the right turn we have refused to find, the single assumption of a half minute or less for the full speed ahead of the engine movement of the tanker that preceded the grounding, destroys the validity of the conclusions reached by the experts. Whatever her bridge engine log book is supposed to disclose, her engine movement book shows that the engines were at full speed for a minute and a half and the engineer's story of the underscoring of the moment of its initiation is not only unsatisfactory on its face but is contradicted by the testimony of the tanker's master who said he stopped the engine immediately when he felt the vessel ground. He certainly felt that as soon as did his engineer.

One of the experts explained the effect of a full ahead motion of the propeller after the vessel was running with a stopped engine. The idea intended to be conveyed was that the hull moved sideways onto the reef. This vessel was moving at seven and a half knots and maybe the right rudder was operating before the propeller took over. The master of the tanker said the stem turned. And the pilot of the accompanying tug that was well up toward the bow was not talking of a sidewise motion when he described the vessel's motion as a nose dive and when he was graphically describing his hurrying to starboard to secure his own safety and that of his tug. He was avoiding the

tanker's stem. The testimony of the men who were at the scene cannot be contradicted by an uncertain hypothesis.

Little need be said of the other witnesses produced by libellant. They were partisan. The ferry pilots displayed animus and withered under cross examination.

Molloy was a straightforward witness who gave direct responsive answers. He said he did not hear the single blast. We cannot say that he did. He put the RINCON HILLS in the wrong place when she blew her alarm. We suppose most mariners would notice an alarm. He thought it was a signal to the attending tug calling it up for service, a quite intelligent conclusion at the time. Molloy himself was where he had a right to be and was not interfering with the tanker in any wise. In such circumstances he might well have noticed the signal without fixing her place too nicely. So far as the tide and its effect at the Battery goes, we believe this veteran of forty years of tug piloting in New York Harbor without a demerit for navigation probably knew as much about it as libellant's experts. His testimony we believe we have demonstrated was implicitly confirmed in the crucial respects of time and space by the RINCON HILLS pilot.

Nothing in the case distracts from the helmsman's error and nothing minimizes its effect.

The libel is dismissed.

Dated: New York, N. Y., June 20, 1956.

/s/ JOHN W. CLANCY,
United States District Judge.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 8, 9, 10 and 11—October Term, 1957.

(Argued December 10 and 11, 1957

Decided July 14, 1958.)

Docket Nos. 24439, 24440, 24441 and 24442

DEEP SEA TANKERS, LIMITED, in its own behalf, as owner of the s/t RINCON HILLS, and as bailee of the cargo laden thereon, and SHELL OIL COMPANY, INCORPORATED, as charterer of said vessel,

Libelants-Appellants,

—against—

The steamtug LONG BRANCH, the RAILWAY CARFLOATS No. 61 and 56, CENTRAL RAILROAD COMPANY OF NEW JERSEY, the steamtugs "AJAX" and "BJAX," the sand barges "A", "B" and "C", and METROPOLITAN SAND & GRAVEL CORPORATION,

Respondents-Appellees.

In the Matter

of the

Petition of the CENTRAL RAILROAD COMPANY OF NEW JERSEY, as owner of the Steamtug LONG BRANCH for exoneration from or limitation of liability.

[1841]

In the Matter

of the

Petition of the CENTRAL RAILROAD COMPANY OF NEW JERSEY, as owner of the carfloat known and designated as CRR of NJ No. 56, for exoneration from or limitation of liability.

In the Matter

of the

Petition of the CENTRAL RAILROAD COMPANY OF NEW JERSEY, as owner of the carfloat known and designated as CRR of NJ No. 61, for exoneration from or limitation of liability.

Before:

MEDINA, LUMBARD and WATERMAN,

Circuit Judges.

Appeal from a decree of the United States District Court for the Southern District of New York, in Admiralty. John W. Clancy, *Judge.* Opinion below reported in 1956 A. M. C. 1723. Reversed and remanded.

CHARLES S. HAIGHT, New York, N. Y. (Robert M. Julian, Gordon W. Paulsen, Richard G. Ashworth and Haight, Gardner, Poor & Havens, New York, N. Y., on the brief), *for libelants-appellants.*

LEO F. HANAN, New York, N. Y. (Charles J. Carroll, Jr. and Machlin, Speer, Hanan & McKernan, New York, N. Y., on the brief), *for respondent-appellee Metropolitan Sand & Gravel Corporation.*

GERALD J. MCKERNAN, New York, N. Y. (Vincent E. McGowan, New York, N. Y., on the brief), *for respondent-appellee Central Railroad Company of New Jersey.*

MEDINA, *Circuit Judge*:

On November 26, 1951, shortly after twelve o'clock noon, the "Rincon Hills," a Canadian tanker, grounded on Dimond Reef, off Governors Island in New York Harbor, and the damage to the ship and cargo is said to exceed one million dollars. Deep Sea Tankers, Limited, as owner of the "Rincon Hills" and bailee of her cargo, and Shell Oil Company, Incorporated, as charterer, within a few days filed a libel against certain tugs and tows of Central Railroad Company of New Jersey and Metropolitan Sand & Gravel Corporation, and against the Railroad Company and Metropolitan, asserting liability for the grounding because of alleged crowding and interference with the navigation of the "Rincon Hills" as she passed along the East River Range for deep draft vessels in her course up the East River. Three proceedings for exoneration from or limitation of liability were then brought by the Railroad Company on behalf of her tug and two carfloats; Metropolitan answered the libel of Deep Sea Tankers, and in the answer included a prayer for relief by way of limitation of liability to the value of Metropolitan's interest in her tug and three sand scows, in the event that they should not be exonerated. There was no separate limitation proceeding initiated by Metropolitan. The above described causes, together with another not involved on this appeal, were consolidated and tried together before Judge Goddard who died on August 26, 1955, after the conclusion of the trial but before the submission of briefs or other argument by counsel. It was stipulated that the

case would be submitted to Judge Clancy on the trial record made before Judge Goddard and, upon this record and the briefs of counsel, but without oral argument, Judge Clancy found the "Rincon Hills" solely at fault, exonerated the two tugs and tows and dismissed the libel. This appeal by libelants followed and, on motion of appellees, we have already held that Judge Goddard's trial notes formed no part of the trial record stipulated to be considered by Judge Clancy and hence are not part of the record now before us. 242 F. 2d 433.

Since the opinion and findings below are based upon the cold record alone, without the benefit of seeing and hearing the numerous witnesses who testified before Judge Goddard, and, as this Court has noted, "we have an eventual responsibility for the facts as well as for the law," *The Bellhaven*, 72 F. 2d 206, 209; *Thorne, Neale & Co. v. Reading Co.*, 2 Cir., 87 F. 2d 694, 696; see also *The Seeandbee*, 6 Cir., 102 F. 2d 577, 581, we have carefully read and studied the entire transcript of 6793 pages and the 196 exhibits and have made new findings of fact in accordance with the clear weight of the evidence. Because of the unusual circumstances to which reference has just been made, we shall set forth our findings in considerable detail.

A bird's eye view of the area within which the tanker and the tugs and tows were proceeding to their respective destinations is given by Chart 369 of New York Harbor. The "Rincon Hills" had left her anchorage at Quarantine in the Narrows, bound for 138th Street, East River; her intended course was through the Upper Bay, past Governors Island, along the East River Range for deep draft vessels, past Dimond Reef and thence up the East River. The Railroad steamtug "Long Branch" and the two carfloats were following and gradually overtaking the Metropolitan diesel tug with three fully loaded sand scows as

they passed under the Brooklyn Bridge down the East River; the destination of the Railroad flotilla was the yards in Jersey City, New Jersey, in a general westerly direction from the Battery, and that of the sand tow was a meeting place with another Metropolitan tug off the Battery, where one of the three sand scows was to be transferred to the other Metropolitan tug. A seemingly wide expanse of open water between the Battery and Governors Island, where small craft may go at will, is disclosed by Chart 369 to be in fact an exceedingly narrow passage for vessels of deep draft. Dimond Reef, in 24 to 27 feet of water, juts out like a sore thumb and the East River Range, with a steady 40 feet of water, is obviously designed as an indispensable aid to navigation for sea going vessels as they proceed up the East River. In terms of fairway for such vessels as they steam up and down stream is little more than 325 yards of deep water between the Range and the relatively shoal area in the neighborhood of the piers and ferry slips in the vicinity of the Battery. The Governors Island Ferry, the Ellis Island Ferry and the Staten Island Ferry all operate across the westerly end of the Range or thereabouts and they as well as most small craft are readily maneuverable and can quickly get out of the way of large steamers or tankers. The two tows involved in this case, however, as will shortly appear, were huge, slow-moving, cumbersome flotillas and it requires little argument to demonstrate that they would constitute a substantial menace to the navigation of large vessels in the vicinity of Dimond Reef, especially on an ebb tide, unless kept clear of the Range.

The "Rincon Hills" was a fully loaded turbo-electric tanker of 10,653 gross tons, 523.5 feet in length and 68.2 feet abeam, drawing 29.8 feet of water forward and 29.9 aft.

The diesel tug "Metropolitan No. 2," of 650 horsepower and 144 gross tons, was 80.6 feet long, beam 23 feet, depth 9.6 feet; the hawser connecting her with the sand scows was 12 to 15 fathoms in length; the scows C-G 202, C-G 150 and C-G 104 respectively 112, 113.4 and 113.3 feet long, fully loaded, were made up in tandem and "fast up close to each other" with hawsers and cross lines—a flotilla of about 500 feet overall. The other dimensions of the sand scows were: C-G 202, 320 gross tons, beam 33.1, depth 8.8; C-G 150, 308 gross tons, beam 32 feet, depth 8.9 feet; C-G 104, 327 gross tons, beam 32 feet depth 9.4.

The steam tug "Long Branch," of 950 horsepower and 229 gross tons, was 104.2 feet long, beam 25.7, depth 14.2. The carfloats Central 56 and Central 61 were of identical dimensions and of steel construction, 291 feet long, beam 40 feet, depth 10.6 feet. Each was a 3-track float, with a capacity of 17 freight cars. There were two empty coal cars and one loaded freight car on one of the floats, the other was light. The floats were on either side of the "Long Branch," all three tightly lashed together, with the bows of the floats brought nearly together ahead of the stem of the "Long Branch," which forced out the sterns of the floats fanwise. There are certain minor discrepancies and contradictions in the record respecting some of the figures, but they are substantially accurate. The sand scows and the carfloats were passive instruments without propulsion equipment of any kind.

At this point we think it will be helpful to separate the facts we deem beyond all reasonable doubt established by the record, so that the more controversial features of the case may be discussed against what we consider to be an unassailable background.

(1) The "Rincon Hills" sounded a single whistle blast, followed by the danger signal of four or five short blasts;

and there was no response to either of these signals by either of the two tugs.

(2) As the two tows proceeded downstream the Railroad carfloats gradually came closer and closer to the sand tow, intending to pass to port of the sand tow; and the carfloats did pass to port of the sand tow, the actual passing taking place after the carfloats went under the bow of the "Rincon Hills."

(3) The stem of the "Rincon Hills" barely missed collision with the carfloats as they crossed her bow.

(4) It was clear weather, with excellent visibility and a fresh westerly wind; the current was running on the ebb a full knot and a half in the direction of Dimond Reef, a fact which the masters of the two tugs did not take into consideration, as it was just about dead low water at the Battery and the two masters of the tugs, who knew it was about low tide, were not aware of the fact that the current continued to run on the ebb well over an hour after low water at the Battery.

(5) Just as or immediately after the carfloats crossed the tanker's bow the pilot gave the order "hard left, full ahead," which was repeated by the second officer and by the helmsman; but the helmsman, because of a "reaction" or intuitive fear of collision, disobeyed the hard left order and put the wheel hard right.

(6) The pilot in charge of the navigation of the "Rincon Hills" was a man of ripe experience, thoroughly familiar with New York Harbor and the set of the current on and near the Range. The masters of the Railroad and Metropolitan tugs were old hands at their trade and should have known what they were about.

General Observations

There were many witnesses, several on board the tanker. The sounding of the danger signal alerted some of these witnesses to the fact that someting unusual was going on. Some of them were on the tows or on ferryboats in the vicinity, one was in his office on the top floor of the Whitehall Ferry Building on shore. Obviously, some of these witnesses were interested; they varied as to intelligence, accuracy of observation and ability to understand the questions, some of which were highly technical. There was an almost universal and quite bewildering disposition by practically all eye-witnesses to guess at distances and time intervals in terms of seconds or minutes. The documentary evidence is, as always, important and we have been particularly impressed by the tanker's Bridge Bell Book. We reject the charge by appellees that the claim of crowding was manufactured out of whole cloth as an afterthought, and that the entries in the Bridge Bell Book were deceptively written up after the event to support the allegedly fictitious claim of crowding and to cover up the "wrong wheel movement of the helmsman." On the other hand, we take such colorful expressions in the testimony as "this carfloat came shooting across the bow of the ship," and "the ship took a nosedive," to be no more than rhetorical flourishes of little consequence or significance.

Except for those charged with the responsibility of navigating the tanker and the two tows, who were under a duty to observe other traffic in the East River, there was nothing to attract the attention of anyone to the scene off Dimond Reef until the danger signal was given. Thus the danger signal alerted some, including the master of the tanker, who was at that time in the chart room abaft the bridge, and the purser, who was in his stateroom counting money. The close proximity of the tanker and the carfloats

when a collision seemed unavoidable drew the attention of others to what occurred immediately prior to the grounding. Doubtless the attention of many others was attracted after the vessel grounded and was motionless. We have necessarily viewed with some skepticism elaborate descriptions, by witnesses not then aboard the tanker or the tows, of the relative positions of the vessels at various times prior to the grounding as honest but at least to some extent unreliable. Viewed from another angle, it seems to us perfectly natural for a person whose attention is thus suddenly focussed on an event or occurrence to see the part of the scene to which his attention is attracted, without taking in the whole picture. For example the master of the tanker ran out from the chart room upon hearing the four or five short blasts. He saw the carfloats which the tanker almost ran down; but did not notice the sand tow. We do not infer from this that the sand tow "was never in the picture," as found by the court below.

The Controversial Issues of Fact

In the discussion which follows we shall endeavor to find the correct answers to the following controversial questions: (1) what were the relative positions of the tanker on the one hand and the two tows on the other when the one-blast signal was given; (2) how close was the sand tow to the carfloats when the carfloats crossed the bow of the tanker; (3) what were the relative speeds of the tanker and the tows just before the "hard left, full ahead" order was given by the pilot; (4) what was the function of the two Meseck tugs, one to port and the other to starboard of the tanker as she steadied on the Range; and did any act or omission of the pilot or those aboard these tugs contribute to the grounding; (5) had the helmsman promptly obeyed the hard left order of the pilot would

the tanker nevertheless have grounded; (6) did the pilot change his course to the right after giving the danger signal and before he ordered "hard left, full ahead."

The Tugs and Tows

It is clear to us that the tugs and tows seriously obstructed the navigation of the tanker and that the negligent operation of both the tug "Metropolitan No. 2" and of the Railroad tug "Long Branch" contributed to the grounding of the tanker on Dimond Reef. We so find. But no fault is found against any of the sand scows or the carfloats nor against the tug "Metropolitan No. 3."

What made our task unduly difficult at the outset was not only the fact that the scene as portrayed in the opinion below is painted with a large brush, but also the confusion caused by a parade of witnesses, who had little or nothing to contribute to the case, and by a welter of inconsistencies and contradictions caused by the marking of charts, and the measuring of distances with dividers, and so on, by other witnesses who at times did not have the remotest idea of what they were doing. But a careful digesting of the entire record lends perspective; and the seeming fog and confusion are readily dissipated. We shall work our way back from the grounding.

While it is probable that the tanker bumped or scraped along the rocky surface of the reef before she fetched up, there is no doubt that she held fast at some part of the northerly tip of the reef, parallel with the Range and hence well south of the Range. We also find that the tanker was south of the Range when the "hard left full ahead" order was given. We shall discuss this point in some detail later on. As we have already indicated, the record in its entirety literally compels a finding that the stem of the tanker missed the stern of the port carfloat by the narrowest of

margins. As this finding is of such critical importance, we shall briefly review the testimony and some of the exhibits marked by some of those who testified.

One of the most impressive witnesses was Robert J. Wilcox, the helmsman on the tanker. This young man frankly admitted that he gave the wheel two or three turns to the right although the order "hard left" had been repeated both by second officer Richard and by himself. He said he did this instinctively and without thinking, because he saw the carfloats practically dead ahead and he thought he would ram them. The fact is that the stem of the tanker had already cleared the stern of the port carfloat, and there is at least a possibility that the stranding would have been avoided had Wilcox done as he was told. But we credit his testimony that the carfloats were so close that he thought he would ram them if he obeyed the "hard left" order. We shall return to Wilcox later when discussing the question of whether or not we should find that the tanker was also to blame.

Ernest Kuinlivan, the boatswain, was up in the forecastlehead to stand by the anchors in case of emergency, and perhaps to make fast a line from one or both of the assisting tugs. He could not have been in a better position to see the distance between the stem of the tanker and the stern of the carfloats. He testified that the clearance was about 30 feet. Philip, the purser of the tanker, ran out of his cabin when he heard the danger-signal, saw the carfloats off the tanker's starboard bow, thought there was going to be a collision and went back to his cabin when he saw the tanker was going to clear the carfloats.

There were two assisting tugs. The "William Meseck" had put the pilot aboard the Tanker at Quarantine. McConnell, the mate of this tug, in charge in the absence of Rowohlt, had first gone to port of the tanker but was

directed by the pilot to move over to starboard, which he did. He saw the sand tow cross the bow of the tanker as the danger signal was blown and testified that the carfloats were "right around the stern" of the sand tow. Edward R. Hoffman, at the wheel of the tug "Hayward Meseck," on the port side of the tanker, testified that the carfloats cleared by 10 feet. Mullock, the master of the tanker, fixed the distance as 25 or 30 feet. Richard, the second officer, testified it was 20 or 25 feet. Rowohlt, the pilot, said he just cleared by about 20 feet. It is claimed that this is contradicted by his testimony at the Coast Guard hearing, a few days after the grounding, but we find no contradiction in view of the diagram (Exhibit 9) prepared by Rowohlt at the Coast Guard hearing. He may have misplaced the tows by not properly portraying the crossing but the proximity of the vessel and the tows is unmistakable.

Henry G. D. Hoffman operating the Governors Island Ferry "Lt. Col. Robert E. Shannon," which left the Battery at 12:15 P. M. and arrived at Governors Island at 12:21 P. M., testified that the two tows and the tanker "seemed to all blend together" and that the clearance at the crossing of the tanker's bow was 10 feet—"the floats just missed getting hit." Roland H. Whelan, quartermaster of the ferry "Ellis Island," which left Ellis Island at 12:15 P. M. and tied up in her slip at the Battery at 12:29 or 12:30 P. M., thought there would surely be a collision. He testified, it "looked very close to me, maybe 10, 20 feet, and I couldn't see how an accident could have been avoided." William G. Tuttle, at the wheel of the "Gold Star Mother," the Staten Island Ferry arriving at her slip at the Battery 12:30 or 12:31 P. M., gives the clearance as 20 to 30 feet, "they were all in very close quarters," with the carfloats

about 100 feet behind the sand tow. We find no trace of animus in the testimony of these witnesses.

It is perhaps understandable that Hutton and Molloy operating the Metropolitan No. 2 tug, with the sand scows, and the "Long Branch," with her carfloats, respectively, should place their tugs and tows at so great a distance from the tanker as completely to negative any interference with the navigation of the tanker. Hutton was completely discredited; and Molloy's testimony at the Coast Guard hearing that his tow cleared the tanker by only 70 feet would seem an insurmountable obstacle to the acceptance of his trial estimate of 200 or 175 or 150 feet in view of the overwhelming testimony to the contrary.

Albert H. Reichert, at the wheel of the tug "Metropolitan No. 3," following some little distance behind the two tows with orders to take off one of "Metropolitan No. 2's" sand scows somewhere in the neighborhood of the Battery, adds little to appellees' version of the stranding. His testimony, when considered in the light of his statement (Exhibit YY), leaves us with the impression that he saw little if anything of the events preceding the actual grounding of the tanker. In any event, he says that the sand tow and the carfloats "were up and out in the North River when the ship was coming up on the range," that the tanker grounded when he was abreast of her and that the two tows "were in the North River at the time." It requires little argument to demonstrate the unreliability of this testimony. Rodden of the Staten Island Ferry "Cornelius Kolf," in the offshore pilothouse in No. 5 Slip South Ferry, is another broken reed. His testimony is a mass of confusion, as is indicated by his insistence that "I saw the Meseck tug blowing the alarm," and that he actually saw the steam from her smokestack as she blew the alarm. Bielinski, the first deckhand or mate of the

"Long Branch" gives the nearest point of the tanker to the carfloats at the time of passing as 400 to 450 feet. There is no trace of partisanship in his testimony, and no outbursts or profanity as in the case of Hutton, but he is clearly mistaken on many points, and we think it may have been unwise to have him present during the entire trial of four months, except for a week or so when he was ill, listening to the testimony of the other witnesses. He was called near the very end of the trial. Bernard Sheridan was sitting on a settee behind Tuttle on the "Gold Star Mother." If it was thought that he would contradict Tuttle's testimony in some vital particulars, his testimony must have been disappointing. He added precisely nothing to the case.

The owners of the tugs and tows lean far too heavily upon the witness William M. McGuire, who described what he said he saw after hearing the alarm signal as he sat at his desk in his office on the top floor of the Whitehall Ferry Building. If his attention was first attracted by the four or five short blasts, as he said, he could not possibly have seen the tanker as she steadied on the Range and he locates the two tows so far away from the tanker as to make his testimony of little value. (See dots placed by McGuire on Exhibit 78.) He characterizes the grounding as "the strangest thing I ever saw," and all the probabilities of the situation militate strongly against a version that describes the tanker, in charge of an experienced pilot, slowing down, then starting up, taking a sudden "sheer" to starboard and fetching up in Dimond Reef, all on a clear day, without any other vessel anywhere near her, and after blowing a meaningless danger signal. No explanation worthy of the name is given for his failure to mention to the representative of appellants' counsel, on the various occasions of their talks together, that he claimed to have seen what he later testified to; nor is it

clear to us why he read parts of the testimony given at the Coast Guard hearing and over 1000 pages of the trial transcript in preparation for his appearance on the witness stand.

Thus we have two long, unwieldy tows, one immediately behind the other and in a position to pass to port of the first tow, the intervening distance between the two being 100 feet or so, crossing the bow of the tanker on a westerly or northwesterly course, at a point where the tanker is already south of the Range. How did the tows get there?

Without discussing the testimony in detail, it will suffice to say that there is abundant evidence to support a finding that, as the tanker came up the bay and past Governors Island she swung on to the Range at about which time the pilot gave the one-blast signal. There was no traffic in sight up the East River except the two tugs and tows. We find the location of the tanker and the two tows was such as to make this signal for a port-to-port passage quite in order, and that he was, as he testified, signalling to the two tows. It was, at the time the single blast signal was given, a meeting head and head. We cannot agree that, as found below, this signal blast was not addressed "to any particular vessel but was only to warn all traffic in the East River of the Rincon Hills' approach." No such signal is provided for in the Navigation Rules for Harbors, Rivers, and Inland Waters, 33 U. S. C. §203, or in the Pilot Rules for Inland Waters, 33 C. F. R. §§80.01-80.36; nor was the one-blast signal here given with any such intent. Unnecessary signals are forbidden, Section 80.35; the proper response if the tugs contemplated a port-to-port passing was a single blast, Section 80.03; if there was some misunderstanding on the part of the tugs, or if they had appreciated the difficulties which necessarily would arise if they turned and exposed the entire string of sand tows and carfloats broadside to the ebb tide, they should

have sounded four or more short blasts, the danger signal, Section 80.1. See also La Boyteaux, *The Rules of the Road at Sea* (1920) 181, 185.

Also, it has been aptly written:

> But I must never fail to remember that in giving forth these "blasts," I must only convey to my opponents the course I am about to follow in accordance with the Steering and Sailing Rules. It must always be present to my mind that if I depart from the Rules, and make signals by "blasts," which may indicate a course or manoeuvre not authorized by the Rules, I and my owners and my ship will probably be condemned in costs * * *. Gray, *Rule of the Road* (4th ed. 1884) 32.

Moreover, the tugs and tows and the tanker were clearly in such relative positions that passing signals were in order; but the tugs made no response to the signal from the tanker, and, to make matters worse, they pursued, even after the danger signal, a course which made disaster almost inevitable.

The pilot waited about 30 seconds for a response from the tows, and then, as neither tug made any response whatever, he blew four or five short blasts—the danger signal. What he meant by this is too obvious for comment. He thought a dangerous situation was developing and he was quite right. But neither of the tugs made any response whatever; and there is undisputed proof in the very testimony of those operating the tugs that, with a reserve power always available for emergencies, no direction was given to the engineer of either craft to increase the speed of his engines. Moreover, there was a strong westerly wind of about 23 miles an hour that could not have failed to slow up the progress of the tows to an appreciable extent.

We hold that passing and danger signals are to be taken to mean precisely what is stated in the Pilot Rules, *supra*.

They have a clear and settled meaning as above stated, and the master who fails to make the appropriate and required response is guilty of a statutory fault and must take the consequences. It may well be that passing signals are frequently unnecessary, but such appears not to be the case here. The disregard of the danger signal is particularly blameworthy.

We are asked by appellants to rule that the approximately 325 yards of deep water from the 23-26-25-21 foot line off the lower Manhattan ferry slips and piers at the Battery to the westerly side of the Range off Governors Island is a "Narrow Channel," within the meaning of the Rule of Navigation, 33 U. S. C. Section 210, which requires vessels and craft when proceeding in such channel to "keep to that side of the fairway or mid-channel which lies on the starboard side of such vessel." Appellees insist that it is well settled law in this Circuit that this body of water is not a Narrow Channel, citing *The Wrestler*, 2 Cir., 232 Fed. 448; *The Bern*, 2 Cir., 74 F. 2d 235; *City of New York* v. *American Export Lines, Inc.*, 2 Cir., 131 F. 2d 902. See also Griffin, *The American Law of Collision* (1949), §36 n. 14 at p. 94. We are inclined to agree with this, especially in view of the extent and conformation of the harbor area involved and the cross or east and westbound traffic, although these cases do not deal with the precise body of water here involved. But we need not give that point the consideration here that it perhaps deserves, as we hold the tows at fault for being where they had no business to be at a time when a deep draft vessel was steaming up the Range. Even if not a statutory fault this is plain, ordinary negligence. See *The Wrestler, supra; The Concho*, S. D. N. Y., 58 Fed. 811, aff'd 2 Cir., 63 Fed. 1023. We hold that when large steamers or tankers or other deep draft vessels are on the Range or steadying on a course past Dimond Reef up the East River, tugs and tows and other unwieldy craft must keep away

from the waters near the Range. On an ebb tide the slightest interference with the navigation of deep draft vessels is apt to end in disaster, as there is practically no room in which to maneuver vessels several hundred feet in length and the current is bearing in a southwesterly direction right over the face of the reef. The danger to the entire waterfront as well as to other ships in the vicinity is also manifest, as oil or gasoline bubbling up to the surface from fractures of the cargo tanks caused by grounding on Dimond Reef or by collision, may at once or later be ignited.

Thus, even in the absence of any lack of response to signals, and irrespective of how they got there, the tows were at fault for not keeping away from the immediate vicinity of the Range, where they interfered with the navigation of the tanker.

The record demonstrates in the clearest possible manner, however, just how the tows found themselves on the Range. It was actually dead low water at the Battery at 12:18 P. M., eight minutes later than the predicted time. The current continued to run out over Dimond Reef on the ebb for about 1½ hours after low water at the Battery. We accept the data prepared by the Currents and Oceanography Branch of the Division of Tides and Currents of the U. S. Coast & Geodetic Survey (Exhibit 100) and reject conflicting data prepared by others. According to the testimony of Don C. Piper, Assistant Chief, the "current comes out of lower East River and is carried in a southwesterly direction, crosses Dimond Reef and on to Governors Island where it is turned to the westward." This witness gives the velocity of the current over Dimond Reef at the stage of the tide already indicated as one and a half knots, and the velocity was greater further up the river as indicated in Exhibit 100.

It so happened that both Hutton and Molloy, in charge of the two tugs, miscalculated the current cycle. Each was under the misapprehension that at low water at the Bat-

tery the current was slack or practically so. It is hard to believe that two such old hands at towing in New York Harbor would make such an error but their testimony to that effect is unequivocal and convincing. Each insists he made no allowance for the current, which is another way of saying that he operated his tug without taking into account that he had underneath him a current carrying him down in the direction of the Range and Dimond Reef at the rate of 1½ knots an hour.

As the incidents already described all took place in the ten or fifteen minutes preceding 12:30 P. M. on the day in question, it is highly probable that both Hutton and Molloy thought they barely had time to make the Battery with the very end of the ebb current, a matter of vital consequence to them. This would explain their remaining in midstream longer than usual, as there was less current near the piers. In any event, in a statement made on December 13, 1951, very shortly after the grounding, by Hutton to the attorney retained to represent Metropolitan, and reduced to writing and signed, Hutton says that after passing below the Brooklyn Bridge "the tow was favoring the middle of the river." He says that he saw the tanker "when the tow was about off Pier 9," and that "when approaching or in the vicinity of Pier 5 we began to pull in toward South Ferry so as to be in a position to round the Battery." Every effort to get away from this at the trial was unavailing. Finally, Hutton confirmed the statement, saying "the statement is true," and "it must be right, I signed it." Under these circumstances, and in view of the position of the vessels when they barely missed collision, we have no other alternative than to hold that the finding below to the effect that Hutton began to pull in when off Pier 8 rather than when off Pier 5 is clearly erroneous.

But, if Hutton's sand tow was favoring the middle of the river until he reached Pier 5, this fixes the position of Molloy and the carfloats following close behind but slightly to port of the sand tow. This is something Bielinski, standing in the pilothouse of the "Long Branch" alongside of Molloy as a sort of observer or lookout, would be likely to notice. And Bielinski's testimony on the subject is explicit. He testified that at Pier 8 the sand tow was ahead "of the starboard carfloat," "a little to our right," with the stern of the last sand scow just ahead "of the center of the starboard carfloat." Accordingly, the carfloats were further out in the river than the sand tow, and, as Hutton waited until he reached Pier 5 to turn in, the carfloats were still to his port. And this relative position of the two tows continued until after they passed the tanker, although they came closer together with each passing moment. Bielinski said the two tows were 200 or 250 feet apart when off Piers 8 and 9, that the distance was slowly closing; and we have already found that they were about 100 feet apart as they crossed the tanker's bow.

On the basis of these facts what happened to the two tows in the few minutes following Hutton's decision to pull in toward South Ferry at Pier 5 is merely an operation of the laws of physics. As the two tugs turned to the West the tows caught the force of the ebb current broadside and they swung out into the river, each now headed West or substantially so, but they were making about as much progress down toward the Range as they were making ahead. Thus strung out the two tows covered a distance of almost 900 feet, including the 100 feet between the two tows, through which 100 feet the tanker could not have passed, and they completely blocked off the tanker. The probability is that Hutton and Molloy were looking toward their respective destinations, completely oblivious

of the danger to the tanker, until they suddenly saw her close aboard.

In view of the foregoing we do not find it necessary to pass upon the question presented by the medical proof relative to Molloy's competence to manage the "Long Branch." We shall return to this subject and discuss it briefly, together with the matter of Charts and Tide and Current Tables, when we come to the subject of limitation.

The Tanker

We find it more difficult to determine whether or not there was fault on the part of the tanker. This involves a consideration of her speed, the various directions given by the pilot after the one-blast signal, whether the assisting tugs should have been ordered to make fast before they started to come alongside and found it impossible to do so, and the circumstances attending the disobedience by the helmsman of the "hard left" order. We have concluded that the tugs "Metropolitan No. 2" and "Long Branch" were solely to blame.

We accept the testimony of Rowohlt, the pilot. There was considerable credible corroborative proof, but we find it not necessary to describe it in detail. Most of the alleged discrepancies between his extensive testimony at the trial and his brief interrogation at the Coast Guard hearing disappear on close analysis. We do not read his testimony at the Coast Guard hearing as stating that there was no interference with his navigation by the two tows. On the contrary, he answered "yes" to the following question, "You said that if the tugs and tows had not been where they were, you would have taken the 'Rincon Hills' on a turn into the East River at about a point where the ship would have been opposite South Ferry, is that correct?" There is more to the same effect. When he testified that

his "hard left" order was not to avoid a grounding or to avoid the tows, we interpret this as meaning that he thought he was a safe distance from the reef and that the tows had already crossed his bow. When he gave it, he believed the "hard left, full ahead" order would take him safely up the East River. But, by way of hindsight, he testified at the trial that, even if the "hard left" order had been executed the tanker would have grounded nevertheless. While at the Coast Guard hearing he does not specifically say that he gave the right wheel order which brought the tanker south of the Range, this is because no questions were asked about his orders to the helmsman after the tanker had steadied on the Range; and he did testify, "We were running parallel with the range and the ship was about half the distance south of the range." He explicitly stated at the Coast Guard hearing that when he gave the one-blast signal the position of the vessel and the tows was one of meeting head and head. Moreover, he testified that both the single blast and the danger signal were addressed to and intended for the tows, and this entire testimony at the Coast Guard hearing must be read in the light of the sketch he then drew, Exhibit 9 on this trial, to which reference has already been made.

The substance of his recital at the trial of the tanker's maneuvers prior to the "hard left, full ahead" order was: after the single blast he steadied on the Range in a matter of seconds at half speed; that 30 seconds after the single blast he sounded the alarm, ordered the engines stopped and gave the right wheel order which was executed, bringing the tanker slightly south of the Range; that the two tows were a good ship's length and a half away when he sound the alarm; that two minutes elapsed between the sounding of the alarm and the grounding. He said he could not bear to port because of the presence of the sand tow

and that he could not reverse his engines as this would turn the tanker to starboard and on the reef. The Bridge Bell Book, which we consider the most important piece of documentary evidence in the case, gives the "full ahead" order at 12:26½ P.M. and at 12:27 P.M. contains the entry "stop struck bottom (Diamond Shoal)." We say this despite the discrepancies between these entries and those made by the oiler in the Engine Bell Book. Moreover, the little curved arrow leading to the words "(Diamond Shoal)" on the preceding line seems to us to be a natural way of making the record in this small note-book. In view of the other entries in the book there seems to us to be no reason to doubt the explanation that the use of the arrow and the previous line was thought preferable to placing "(Diamond Shoal)" on the line underneath. We find nothing suspicious about this entry or the entries in the rough log of the vessel. Accordingly, we find, on the basis of this and other proof, not only that the refusal to find that the right wheel order was given and executed was clearly erroneous, but in addition that the tanker was continuing to swing slightly to starboard when the "hard left" order was given, that she was still on a right swing when she hit the reef, and that the interval of time between the turning of the wheel to the right rather than to the left as ordered, and the correction of this mistake by the helmsman, was no more than 15 or 20 seconds at most. In response to the order to correct his mistake he was turning the wheel to the left as she struck. As we are favorably impressed by the competency of the experts who testified on the tanker's behalf and the accuracy of their opinions on the subject of the lateral movement of the vessel, we are convinced that in all probability the tanker could not have cleared the reef if the "hard left" order had been properly and promptly executed. See Knight, *Modern Seamanship*

(11th ed. 1948) 294. But we cannot be certain of this and hesitate to make a finding to that effect because there is no way of knowing with any degree of accuracy what the precise position of the tanker was with relation to the reef when the order was given.

The speed of the tanker was approximately 7½ knots, even after the engines were stopped. Under normal conditions this would not be excessive. We have found it impossible to estimate the speed of the tugs and tows. Perhaps the sand tow was making 3 knots or so and the carfloats more. We estimate these speeds through the water rather than over the ground. The question then is: from the moment it was apparent that a dangerous situation was developing ahead, did the pilot take every reasonable and available means of meeting it. When the single blast signal was given the intended course of the two tows could not have been known by Rowohlt. It is still difficult to understand Molloy's persistence in following close behind the sand scows and to port of the sand scows. With the power at his disposal, and the fairly light load as compared with a full load of 17 cars, he could easily have passed the sand tow to starboard and got out of the tanker's way. It is not unlikely that his mental operations were affected to some extent by his chronic hypertension and by the sedatives he was taking on his doctor's advice. For all Rowohlt knew the carfloats were headed up Buttermilk Channel. In any event, it was not until he got no response from either tug to his single blast signal that Rowohlt knew or could have known that a dangerous situation was developing. We can only conclude that the failure to respond to the single blast signal and the manner in which the two tows proceeded thereafter was due to negligence and inattention on the part of Hutton and Molloy, and their testimony gives ample support to this conclusion.

[1864]

Accordingly, we must test the question of fault on the part of the tanker by ascertaining what, if anything, Rowohlt could have done to avoid running down the car-floats or coming perilously close to the reef after he sounded the danger signal. He did stop his engines. Could he have safely reversed his engines? We have concluded, on the basis of the expert opinion testified to, and other supporting proof, that this maneuver would have brought the tanker on the reef. In this connection it must be borne in mind that a current of one and one-half knots was flowing in the direction of and over Dimond Reef. There was little or no possibility that reversing the engines could have had any effect other than to increase the danger. How about the assisting tugs? Rowohlt had already ordered one of them from the port to the starboard side of the tanker. Surely there was no occasion to have more than two assisting tugs and it seems quite reasonable to place one of them to port and the other to starboard. The dangerous situation, due in no small part to the failure of the two tows to respond to the single blast signal, developed only when it became apparent that the two tows were oblivious to or unmindful of the way they were obstructing the progress of the tanker on the Range; and this, as it later turned out, was due to the miscalculation by both Hutton and Molloy of the force, velocity and direction of the current. At the time the single blast signal was given McConnell was in the very act of bringing the "William Meseck" in close to make fast to the tanker on or near her starboard bow. But this became impossible as Rowohlt gave his right wheel order, and the swing to starboard which brought the tanker south of the Range forced McConnell to drop back. We may add, parenthetically, that the only fair inference to be drawn from McConnell's testimony, taken in its entirety, is that the right swing he was describing

was the result of the right wheel order given after the sounding of the danger signal, and not to any action of the tanker due to the mistake of the helmsman later on. Edward R. Hoffman testified that he was in charge of the tug "Hayward Meseck" to port of the tanker, and that he was prevented from making fast to the tanker's port bow by the proximity of the sand tow. The sand scows came so near his tug that he dropped in close alongside the port side of the tanker, and he was forced to stay there as the carfloats immediately followed the sand scows. This brief review of the testimony we think disposes of the claim that proper use was not made of the assisting tugs.

Accordingly, this phase of the case comes down to the act of the helmsman in disobeying the "hard left" order of the pilot. Ordinarily, such disobedience, if it contributed to a collision or grounding, would constitute a fault chargeable to the vessel. It is the most serious charge made against the tanker in this case, and the one that has caused us the most difficulty. Taking all the attendant circumstances into consideration, however, we have concluded that an *in extremis* situation existed and the natural and instinctive reaction of the helmsman, faced as he thought with the certainty of ramming the carfloats, is excusable. It will be recalled that the "hard left" order was repeated both by the second officer Richard and by the helmsman himself. We find the tanker free from fault.

Limitation of Liability

The Railroad, within six months after notice of claim, filed petitions for exoneration from or limitation of liability as owner of the "Long Branch" and of each of the two carfloats. All procedural requirements were concededly complied with; and we are presented with several interest-

ing questions of law, none of which was passed upon by the court below, as the tanker was found to be solely at fault and the tug and the carfloats were exonerated.

Appellants, without citing any authority, claim that the "Long Branch" and the carfloats were not engaged in any maritime undertaking but were acting merely as a ferry in an exclusively railroad operation, and they would have us hold that the legislation embodied in 46 U. S. C. Sections 183 and 185 was not intended by the Congress to be applicable to railroad lighterage in New York Harbor, for the reason, among others, that the inclusion of vessels engaged in railroad car lighterage would not contribute in any way to putting American shipping upon an equality with that of other maritime nations. And we are referred to clauses used in Uniform Bills of Lading as in some way supporting this view. But we think it too clear to require extended discussion that the tug and tow were vessels within the meaning of the words "any vessel" in the Limitation of Liability Act. The operation here involved was maritime; those aboard each of these vessels doubtless came under the protection of the Longshoremen's and Harbor Workers' Compensation Act, 33 U. S. C. Section 901 *et seq.*; and the fact that the carfloats were designed and built for the specific purpose of transferring railroad freight cars from one railroad terminal to another in and about New York Harbor does not make the operation any the less maritime in character.

Appellants also contend that neither the Railroad nor Metropolitan is entitled to limit its liability because both the tug "Long Branch" and the tug "Metropolitan No. 2" were unseaworthy with the knowledge and privity of their owners. With respect to both tugs it is claimed by appellants that no copies of the Charts, Tide Tables and Current Tables issued by the United States Coast and Geodetic Survey were provided to the tugs to be kept on

board always available for use. But both Hutton and Molloy were obviously familiar with the waters covered by the Charts of New York Harbor. As to the Railroad the evidence is that Charts as well as Current Tables were available and could have been obtained on demand at the Dispatcher's Office at any time by Molloy or other tug captains in the employ of the Railroad, if they were to operate in any part of the Harbor concerning which they felt further information should be had or if they had any other special need of them. The evidence concerning Metropolitan is less clear but it is probable that Charts were available or actually on "Metropolitan No. 2" but the Current Tables were not. The "Long Branch" and the "Metropolitan No. 2" each had on board a Commercial Tide Calendar giving high and low water at Sandy Hook, the Battery and Hell Gate. Taking the evidence as a whole we think both the Railroad and Metropolitan acted reasonably in committing the navigation of their tugs to these two men of many years experience towing in the very waters involved in this case without making further provision for either Charts or Current Tables. Many of the witnesses testified that it was not customary to have them on board harbor tugs. We are still at a loss to understand how Hutton and Molloy miscalculated the current cycle; but the mere fact that they did so does not convince us that the failure to make further provision for Charts and Current Tables aboard these tugs was a wilful fault by the owners such as to deprive them of the benefits of the Limitation of Liability Act.

As to Molloy appellants most earnestly press the claim that there was wilful fault on the part of the Railroad in permitting him to continue as Master of the "Long Branch," despite knowledge of his chronic high blood pressure. We think, however, that it is a sufficient answer to say that a competent medical examiner, acting on behalf of the Rail-

road, passed him subject to reexamination as fit for duty. It may well be that there was inexcuseable delay in producing some of the records and others were never produced; but what we considered to be the whole story came out in the end and we find nothing to impugn the good faith of the medical examiner.

Appellants also raise an interesting and important question not previously passed upon by us, so far as we are aware, and on which there are conflicting decisions in the District Courts for the Eastern and Southern Districts of New York and elsewhere.[1] It will be recalled that Metropolitan filed no separate or other petition for limitation of liability but, long after the six months period after notice of claim as provided in 46 U. S. C. Section 185, Metropolitan alleged the Limitation Act, 46 U. S. C. Section 183(a), as a partial defense to the libel. Appellants assert that there can be no limitation of liability unless a proper claim therefor is made, either by the filing of a petition for limitation or by way of defense to a libel or other court proceeding within six months after notice of claim. In other words, appellants would have us hold that every claim of limitation of liability asserted under 46 U. S. C. Section 183(a) is subject to the six months requirement of 46 U. S. C. Section 185.[2]

The law is well settled that a petition to limit liability pursuant to 46 U. S. C. Section 185 is valid and effective

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1 Six months time limit applicable: *Cantwell* v. *Meade*, E. D. N. Y., 120 F. Supp. 406; *The Irving*, S. D. N. Y., 33 F. Supp. 59; cf. *The Joseph O'Donnell*, E. D. N. Y., 37 F. Supp. 120.

Six months time limit not applicable: *De Cruz* v. *Hicring*, D. N. J., 60 F. Supp. 397; *Cantey* v. *McLain Line, Inc.*, S. D. N. Y., 40 F. Supp. 887; *Coryell* v. *Pilkington*, S. D. Fla., 39 F. Supp. 142; *Carpenter* v. *Mary R. Mullins, Inc.*, D. Mass., 33 F. Supp. 10.

2 Section 183(a):

> The liability of the owner of any vessel * * * for any loss, damage, or injury by collision * * * done, occasioned, or incurred, without the

only if it is filed within six months after the shipowner receives written notice of claim. *The Fred Smartley, Jr.*, 4 Cir., 108 F. 2d 603; *Standard Wholesale Phosphate & Acid Works, Inc.* v. *Travelers Ins. Co.*, 4 Cir., 107 F. 2d 373; *The Irving*, S. D. N. Y., 28 F. Supp 585, aff'd 2 Cir., 107 F. 2d 1011; *The Grasselli Chemical Co. No. 4*, S. D. N. Y., 20 F. Supp. 394.

There is, however, a separate and distinct procedure by which a shipowner may limit his liability in accordance with 46 U. S. C. Section 183(a). A shipowner may institute a separate proceeding by the filing of a petition for limitation or he may plead the limitation statute, 46 U. S. C. Section 183(a), in his answer as a defense to suit against him. See 3 *Benedict on Admiralty* (6th ed. 1940) Section 508.

The Third Circuit, in a well-reasoned opinion by Judge Goodrich, has held that the six-month period does not govern a plea of limitation by way of answer. *The Chickie*, 3 Cir., 141 F. 2d 80, 84-85. In reaching its decision in *The Chickie* the Court reviewed the historical development of the two different procedures available to shipowners to limit their liability. We are in accord with the analysis developed in Judge Goodrich's opinion and we hold that a plea of limitation by way of answer is not subject to the six-month time limit in Section 185. It is to be noted, however, that all those interested, including the "Rincon Hills" as bailee of the cargo, are parties to the consolidated proceeding now before us in which the respective claims of limitation are asserted.

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privity or knowledge of such owner or owners, shall not * * * exceed the amount or value of the interest of such owner in such vessel, and her freight then pending.

Section 185:

The vessel owner, within six months after a claimant shall have given to or filed with such owner written notice of claim, may petition a district court of the United States of competent jurisdiction for limitation of liability within the provisions of this chapter * * *

The first statute authorizing the limitation of liability, the forerunner of Section 183, was enacted in 1851, 9 Stat. 635. In 1872 the Supreme Court promulgated admiralty rules of procedure which permitted a shipowner to petition for limitation of liability. Shortly thereafter the Congress enacted the substance of these rules into law. In commenting on the purpose of the rules, the Supreme Court said they "were adopted for the purpose of formulating a proceeding that would give full protection to the shipowners in * * * a case" where there were "various parties claiming damages against them for injuries sustained by mishaps to the ship or cargo." "They were not intended to prevent them from availing themselves of any other remedy or process which the law itself might entitle them to adopt. They were not intended to prevent a defence by way of answer to a libel, or plea to an action, if the ship-owners should deem such a mode of pleading adequate to their protection." *The Scotland*, 105 U. S. 24, 33-34. It is unnecessary to comment on the variety of situations that may arise, in some of which concursus is highly desirable if not indispensable and in others not.

In practice it developed that the proceeding by way of petition for limitation of liability was often a source of delay and circuity of action, because shipowners did not institute this independent proceeding until after the question of liability had been litigated and determined against them. To alleviate the abuses inherent in this situation, the Congress, on June 5, 1936, amended Section 185 to require that a petition for limitation must be filed within six months of notice of claim.

Section 185, as amended, does not refer to Section 183 (a), and no reason has been advanced by appellants for making the right to limitation as provided in Section 183(a) subject to the six months time bar. Indeed, the Congress amended both Section 183(a) and Section 185

simultaneously in 1936 without specifying any time limit in Section 183(a). Moveover, the abuses which resulted under Section 185 prior to its amendment are not encountered when limitation is pleaded by way of answer, because the libelant, by filing its libel, controls the time within which the remedy must be invoked. Therefore, in accord with *The Chickie, supra,* we hold that the Metropolitan plea of limitation in its answer was not barred by the six months time limit of 46 U. S. C. Section 185.

Appellants, pursuing what seems to be another phase of the point just above discussed, assert that Metropolitan "posted no bond or stipulation." If all that is meant by this is that the requirements of Section 185, as to time and the posting of a bond or stipulation, are to be read into Section 183, it will suffice to say that we hold otherwise. On the other hand, when limitation of liability is asserted by way of defense in the answer there are interlocutory remedies open to a libellant to prevent loss or depreciation of the vessel by requiring surrender or the posting of security. These are procedural matters which do not appear to affect the substantive rights of the parties and they are normally litigated before or at least during trial. As the record discloses that certain proposed stipulations were served by Metropolitan on the office of libelants' proctors but were apparently mislaid, and there are references to attempts to agree upon a form of stipulation similar to the one entered into with the Railroad, we have concluded that, in this unclear state of the record, we shall and do leave this point open, to be decided by the District Court on the remand.

We next consider whether the Railroad and Metropolitan limitation funds must include the value of all craft in each of the two flotillas, as is urged by appellants, or whether the surrender of the tugs "Long Branch" and "Metropolitan No. 2," and not the scows or carfloats, is

sufficient for the purpose of limiting liability, as contended by the respective appellees. If the question were an open one we would be disposed to include the whole flotilla if we could, especially in the case of the carfloats, but we must take the law as we find it, and the question is no longer open. In *Liverpool, Brazil & River Plate Steam Naviga ion Co.* v. *Brooklyn Eastern District Terminal*, 251 U. S. 4[illegible], libelant's steamship was damaged while it was moored at a pier in Brooklyn when a carfloat lashed to the port side of respondent's tug collided with it. The tug was proceeding up the East River with the carfloat on its port and a disabled tug on its starboard side. All three vessels were owned by respondent. The sole question before the Supreme Court was "whether the value of the whole flotilla should not have been included in the (limitation) decree." The Court held that only the value of the tug was required by law to be included, because the carfloat, although it was the vessel which collided with the steamship, was a "passive instrument in the hands of" the tug, and "for the purposes of liability the passive instrument of the harm does not become one with the actively responsible vessel by being attached to it." Previously there had been disagreement among the Circuits regarding this question. See *The Begona II*, D. Md., 259 Fed. 919. But the Supreme Court, in an opinion by Justice Holmes, in the *Liverpool* case agreed with the Second Circuit view that the tug and tow did not become one vessel and placed the question at rest on the theory that the words "any vessel" in the Limited Liability Act meant the offending vessel and not others attached to it, even though all were in common ownership and engaged in a common venture. We are not at liberty to disregard this binding precedent simply because a contrary view may seem to reach a conclusion more in keeping with the realities of this particular case.

[1873]

As we have previously noted, it is clear that the car-floats and sand scows in tow of the tugs "Long Branch" and "Metropolitan No. 2" were merely passive instruments of navigation. They had no motive power of their own. Accordingly, only the value of the two tugs need be included in the limitation fund.

Those cases cited by appellants, in support of their position that the passive instrument as well must be surrendered, involved a breach of contract where the libelant had entered into a contractual agreement with the respondent, either for the transportation of himself and his goods, *The Big Chief*, E. D. Mo., 75 F. Supp. 496; see also, *The Columbia*, 9 Cir., 73 Fed. 226, or of employment, *Standard Dredging Co.* v. *Kristiansen*, 2 Cir., 67 F. 2d 548. As no such contractual relationship existed between any of libelants and either the Railroad or Metropolitan, the cases cited by appellants are not in point. This distinction is noted in *Sacramento Nav. Co.* v. *Salz*, 273 U. S. 326, 332, a case involving exoneration under the Harter Act, as follows:

> This court held (in Liverpool) that it was necessary to surrender only the active tug, saying "that for the purposes of liability the passive instrument of the harm does not become one with the actively responsible vessel by being attached to it." But this is far from saying that the entire flotilla might not be regarded as one vessel for the purposes of the undertaking in which the common owner was engaged at the time of the collision. The distinction seems plain. There the libel was for an injury to a ship in no way related to the flotilla. It was a pure tort—no contractual obligations were involved; and the simply inquiry was, What constituted the "offending vessel"? Here we must ask, What constituted the vessel by which the

contract of transportation was to be effected? a very different question.

See also, *In re O'Donnell*, 2 Cir., 26 F. 2d 334.

Moreover, if fault is attributable to more than one of the vessels engaged in a common venture or enterprise, each with motive power of its own, then each such vessel must be surrendered. *United States* v. *The Australia Star*, 2 Cir., 172 F. 2d 472. Likewise, if a vessel in tow of a negligent tug is found at fault, the value of both vessels must be included in the limitation fund. *Petition of Lake Tankers Corp.*, S. D. N. Y., 1955 A. M. C. 55; *The Bowling Green*, E. D. N. Y., 11 F. Supp 109, aff'd 81 F. 2d 1017. But, in the case before us, as in *Liverpool*, no fault whatever is attributable to the sand scows or to the carfloats. It is true that they made the flotillas more cumbersome, but it does not follow that they were at fault, and we hold they were not.

The decree below is reversed and the consolidated cases are remanded for further proceedings not inconsistent with this opinion.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the fourteenth day of July, one thousand nine hundred and fifty-eight.

Present:

HON. HAROLD R. MEDINA
HON. J. EDWARD LUMBARD
HON. STERRY R. WATERMAN
Circuit Judges

DEEP SEA TANKERS, LIMITED, in its own behalf, as owner of the S/T "RINCON HILLS", and as bailee of the cargo laden thereon, and SHELL OIL COMPANY, INCORPORATED, as charterer of said vessel,

Libelants-Appellants,

—against—

The steamtug "LONG BRANCH", the RAILWAY CARFLOATS No. 61 and 56, CENTRAL RAILROAD COMPANY OF NEW JERSEY, the steamtugs "AJAX" and "BJAX", the sand barges "A", "B" and "C", and METROPOLITAN SAND & GRAVEL CORPORATION,

Respondents-Appellees.

Index No. 24439

JUDGMENT

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

On Consideration Whereof, it is now hereby ordered, adjudged, and decreed that the decree of said District Court be and it hereby is reversed and action remanded for further proceedings not inconsistent with the opinion of this court; with costs to the appellants.

A. Daniel Fusaro
Clerk

[292] and it looked to me as though if I had stayed on the direct course or on the range that I had a risk of collision.

Q. Did the Rincon Hills respond to the right-wheel order you gave? A. Yes, sir.

Q. Can you tell us whether she actually came off the range across the line? A. Yes, she came off the range line to the south. I was observing the lights and we had at that time cracked the range lights back to the south.

Q. When you say "cracked to the south," would you explain a little more what you mean by that? A. Well, in other words, instead of running directly head on to the range, and by opening the red light to the south of the green light, that would bring me off the range; in other words, south of the range, to avoid colliding with the carfloats.

Q. When you turned south of the range line course, is that the same side of the range line on which lies Diamond Reef? A. That is right, sir.

Q. Did you observe anything with respect to the speed of the Jersey Central tug and carfloats in relation to the speed of the sand tow? A. It appeared to me that the carfloats and tug

* * * * *

[339] this answer, page 27:

"Q. Where did he appear to be bound? A. Well, I took it for granted he was bound for the stakeboats in Jersey City, and the Jersey Central also bound for Jersey City."

Did you give that answer? Were you asked that question and did you make that answer? A. That is correct, in this respect, that when I was asked that I was up on the range far enough to distinguish the sand tows and I

know then that the sand tows would either be bound for the stakeboats or somewheres in that vicinity by that particular time. When I was way out here, I didn't know, I couldn't tell whether they were Metropolitan, Steers, or I couldn't tell whether it was Jersey Central or who they were. I think I stated that before, that I didn't know.

Q. How long after that was it that you gave the one-blast signal? A. After the first sighting?

Q. Yes. A. Oh, I don't know. It may be a minute or two.

Q. Are you guessing or have you any reason to believe? A. As I said before, I had—I didn't take no

* * * * *

[373] going south or northwest or what? A. I know they were heading south, but just which direction they would be later heading, I didn't know.

Q. If the two tows had proceeded south on the courses they were heading without swinging off to the westward, was there any state of traffic or other vessels which would have prevented the tows from continuing south and right across Diamond Reef towards Governor's Island shore? A. I didn't see any tows in that vicinity that would have stopped them from doing that.

Q. What is the depth of water? What is the shallowest depth of water above Diamond Reef? A. Well, the shallowest depth on Diamond Reef is about 24 feet.

Q. Were these tows drawing anything like 24 feet? A. I doubt it.

Q. Why did you wait the interval you did at the time you first observed the tugs and tows until the time when you blew your one short whistle signal? A. Well, I waited for a decision because we weren't on head and head or anywheres near so. So I waited until I could make an estimation of which way they were going to head. At the first sighting there [374] was such a difference in the headings

that anything could be decided beforehand and, therefore, I couldn't make a decision which way they were going.

Q. By that, then, do you mean that you waited until you reached that decision before you gave your one-blast whistle signal? A. That is right.

The Court: You never did get any signals from them?

The Witness: None whatsoever that I could hear.

The Court: You are sure of that?

The Witness: Yes, sir.

Q. How was the wind blowing from or—how was it blowing as between your ship and the sand tows? A. Well, the wind was very strong westerly wind and that would carry their sound away from me, if they did make any sound, and had a possibility to anyway.

Q. Is it right that the wind was blowing from your ship towards the sand tows? A. That is right.

Q. And the Jersey carfloats? A. That is correct.

Q. As you observed the sand tow from her position when you first sighted her, will you tell us what, if any, effect the ebb tide had on her

* * * * * *

[797] Mr. Haight: Yes.

By the Court:

Q. How far ahead of the Rincon Hills did the sand tow pass? How close? A. You mean how close to the bow of the ship when they passed?

Q. Yes. I think you said that the sand tow passed across the bow. A. Well, I wouldn't say they passed across the bow. They was setting down to cross the bow, so as

near as I can remember they cleared the ship possibly about 40 feet.

By Mr. Haight:

Q. When you say they cleared the ship, what part of the sand tow would you describe? A. That was the last scow, the stern of the last scow.

Q. Did the stern of the last scow clear your tug, the Hayward Meseck? A. Yes.

Q. By about what distance? A. I would say about the same distance, 40 feet possibly.

Q. At that time what was the distance between your tug's starboard side and the port side of the

* * * * *

[1538] the sand tow disappeared from your view entirely? A. Well, I don't know. I didn't pay much attention to it after that.

Q. At the time that the alarm signal was blown did you see the sand tow or had she disappeared from your view? A. I don't recall on that.

Q. At the time the Rincon Hills blew the one-blast signal was she still swinging to the right or had she steaded on the range at that time? A. She was steady on the range then.

Q. Then did she continue to be steady, continue for any length of time or any period of time? A. Well, I couldn't say just how long, but she was on the range, and I started to come in and get alongside.

Q. And at the time the alarm signal was blown was the Rincon Hills on the range then? A. Yes, sir.

Q. Was she steady at that time? A. Yes, sir.

Q. And it was some time after the alarm signal was blown that the tug—that the Rincon Hills started to go to the right, isn't that so? A. That is right.

Q. How long after the alarm—how long a period [1539] of time elapsed between the alarm signal and when the Rincon Hills started to go to the right you don't know, do you, sir? A. I wouldn't say for sure, no. It wasn't very long but I couldn't say in time, though.

Q. Captain McConnell, at the time that you were off the starboard—at the time that you took your position off the starboard side of the Rincon Hills, 20 feet off the bridge, wasn't the Rincon Hills at that time heading for the Battery? A. Yes, sir.

Q. And that is the time when you observed the sand tow up off Pier 9, isn't that right? A. No, sir.

Q. When did you observe the sand tow with respect to that? A. When he was—when I was coming alongside of the ship.

Q. Do you remember testifying before the Coast Guard? A. Yes, sir.

Q. You remember these questions, and you gave these answers—

Mr. Haight: Page?

Mr. Hanan: Page 9.

Q. —"Q. When you dropped back alongside the

STATUTE

Title 33 C. F. R. Sec. 80.03 (Pilot Rules Inland Waters)

§ 80.03 Signals. (a) The whistle signals provided in the rules in this part shall be sounded on an efficient whistle or siren sounded by steam or by some substitute for steam.

(1) A short blast of the whistle shall mean a blast of about one second's duration.

(2) A prolonged blast of the whistle shall mean a blast of from 4 to 6 seconds' duration.

(3) One short blast of the whistle signifies intention to direct course to own starboard, except when two steam vessels are approaching each other at right angles or obliquely, when it signifies intention of steam vessel which is to starboard of the other to hold course and speed.

(4) Two short blasts of the whistle signify intention to direct course to own port.

(5) Three short blasts of the whistle shall mean, "My engines are going at full speed astern."

(b) When vessels are in sight of one another a steam vessel under way whose engines are going at full speed astern shall indicate that fact by three short blasts on the whistle.

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Supreme Court of the United States

OCTOBER TERM, 1958

No. 564

METROPOLITAN SAND & GRAVEL CORPORATION, as owner of the Tugs Metropolitan No. 2 and Metropolitan No. 3, and the Sand Scows G-G 202, G-G 150 and G-G 104.

Petitioner,

against

DEEP SEA TANKERS, LIMITED, as owner of the s t Rincon Hills, and as bailee of the cargo laden thereon, and Shell Oil Company, Incorporated, as charterer of said vessel

Respondents.

BRIEF OF RESPONDENTS DEEP SEA TANKERS, LIMITED, AND SHELL OIL COMPANY, INCORPORATED, IN OPPOSITION TO CROSS-PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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F—Diagram drawn by Captain Coleman L. Molloy of the tug Long Branch at Coast Guard investigation 1f

G—Copy of Appendix F with additional markings made at the trial by Captain Molloy 1g

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CASES CITED

A. H. Bull S. S. Co. v. *United States*, 34 F. 2d 615 (2nd Cir. 1929) 14

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The Eugene F. Moran, 154 Fed. 41 (2nd Cir. 1906) .. 15

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The New York, 175 U. S. 187 (1899) 16

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

METROPOLITAN SAND & GRAVEL CORPORATION, as owner of the Tugs Metropolitan No. 2 and Metropolitan No. 3, and the Sand Scows G-G 202, G-G 150 and G-G 104,
Petitioner,

—against—

DEEP SEA TANKERS, LIMITED, as owner of the s/t Rincon Hills, and as bailee of the cargo laden thereon, and Shell Oil Company, Incorporated, as charterer of said vessel,
Respondents.

No. 564

BRIEF OF RESPONDENTS DEEP SEA TANKERS, LIMITED, AND SHELL OIL COMPANY, INCORPORATED, IN OPPOSITION TO CROSS-PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Opinions of Courts Below

The opinions of the courts below are adequately set forth in the appendix to the cross-petition.

Jurisdiction

The cross-petition asks this Court to review questions of fact decided by the courts below. The alleged jurisdictional basis for a writ of certiorari is Rule 19(b) of this

Court. However, there is no conflict in decisions, nor is there an important question of federal law involved in the cross-petition and there has been no departure by the Court of Appeals from the usual and accepted judicial procedure, in deciding questions of fact, requiring this Court's intervention.

Question Presented

Whether this Court will grant a writ of certiorari to review findings of fact made by the Court of Appeals, which are contrary to those of the District Court, in the unique situation where a Judge of the District Court dies before rendering an opinion and, by agreement, the record made before the trial judge is referred to another District Judge for decision based upon reading the transcript of the testimony and examination of the exhibits, and where upon appeal the Court of Appeals had before it the same transcript and exhibits as were before the District Court?

The opinion in the District Court was written by a judge who had not seen or heard any of the witnesses and, therefore, the usual intangible elements derived from observing the conduct and demeanor of witnesses were missing.

We submit that the decision of the Court of Appeals, in reversing findings of fact made by a District Judge under such circumstances, does not fall within that class of cases over which this Court will exercise its discretionary jurisdiction.

The three questions presented by cross-petitioner as to whether the Court of Appeals "applied proper standards" or "reached the proper result" do not raise questions of law, but refer to questions of fact.

Although cross-petitioner's position is not clear, it apparently urges that in order for the Court of Appeals to reverse the District Court the findings of the District Court must be "clearly erroneous" as distinguished from

"erroneous". We urged, upon the appeal, that because Judge Clancy had not seen or heard any of the witnesses, all that the appellants (respondents in this Cross-Petition) would have to prove would be that his findings were erroneous; but that, in any event, Judge Clancy's findings were "clearly erroneous". The opinion of the Court of Appeals states that its new findings were made "in accordance with the clear weight of the evidence" (Cross-Petitioner's appendix, 17a).

In this particular instance it makes no difference whether the findings of fact by the District Court were "erroneous" or "clearly erroneous" because the Court of Appeals opinion is based upon the "clear weight" of the evidence, and this is just another way of saying "clearly erroneous".

Statute and Rule Involved

28 U. S. Code, sections 1254(1) and 2101(c). Rule 19(b) of the Rules of this Court.

The Court of Appeals would be justified, under the circumstances created by the trial judge's death, in substituting its opinion for that of the District Court regardless of whether the District Court was simply erroneous as distinguished from clearly erroneous. In any event, the issue raised by the cross-petition concerns only questions of fact under unusual circumstances which are not of such general interest and importance as to be reviewed by this Court, pursuant to its discretionary powers under the Statute and Rule cited.

Cross-petitioner claims that Rule 1, Article 18, of the Inland Rules of Navigation, 33 U. S. C. 203, is involved in this appeal. It is true that this was one of the statutes which was considered by the Court of Appeals (Cross-Petitioner's appendix, 28a). It is not true, however, as

hereinafter shown, that the Court of Appeals considered the statute under the facts alleged by cross-petitioner.

We submit that cross-petitioner's claim that Rule I, Article 18, is involved in this cross-petition, as used in the context in which it was presented, is not correct and that the citation of this rule of navigation is simply for the purpose of giving the appearance that some question of law is involved.

Statement

A libel was filed by the respondents in the United States District Court for the Southern District of New York to recover damages resulting from the grounding of the s/t Rincon Hills on November 26, 1951, in New York harbor. The libel was *in personam* against Central Railroad Company of New Jersey, and *in rem* against its tug, the Long Branch, and its carfloats No. 61 and No. 56. The libel also proceeded *in personam* against Metropolitan Sand & Gravel Corporation, and *in rem* against its tugs, Metropolitan No. 2 and Metropolitan No. 3, and *in rem* against the three sand scows which were being towed by Metropolitan No. 2.

Metropolitan Sand & Gravel Company answered the libel. Central Railroad Company of New Jersey did not answer but, instead, filed separate petitions seeking exoneration from, or limitation of, liability.

The libel and the petitions were tried before the Hon. Henry W. Goddard from March 11, 1955 to June 10, 1955. Decision was reserved. Judge Goddard died in August, 1955, before briefs were submitted to him. By agreement, the transcript of testimony and exhibits were referred to Hon. John W. Clancy for decision by him upon the entire record made before Judge Goddard together with briefs and oral arguments if desired by Judge Clancy.

Main briefs were furnished to Judge Clancy on May 7, 1956. Reply briefs were furnished to him on May 23, 1956. Final or Answering briefs were furnished on May 28, 1956. Judge Clancy did not call for oral argument. His opinion, in final form, is dated June 20, 1956, or 23 consecutive days after final briefs were handed in. The opinion by Judge Clancy is set forth in cross-petitioner's appendix at pages 1a to 13a. The libel was peremptorily dismissed as to all parties named therein. Judge Clancy found as a fact that the grounding of the Rincon Hills was due entirely to her own navigation. He found that whistle signals blown by the Rincon Hills could be ignored and that, in effect, none of the tugs, carfloats or scows were in the immediate vicinity at the time of the events leading up to the casualty or at the time of the grounding. Judge Clancy, in so finding, ignored the testimony of disinterested witnesses who were on ferry boats in the area. These witnesses were disposed of by Judge Clancy with the single sentence "The ferry pilots displayed animus and withered under cross examination" (Cross-petitioner's appendix, page 13a). The fact is that these witnesses had no motive other than to tell the truth. Their ferries were operated by the Department of the Army, the Immigration Department and the City of New York. The Court of Appeals stated "we find no trace of animus in the testimony of these witnesses" (Cross-petitioner's appendix p. 26a).

Appeals were taken to the United States Court of Appeals for the Second Circuit. The appeals were argued on December 10 and 11, 1957 and were decided seven months later on July 14, 1958. The opinion of the Court of Appeals is reproduced in cross-petitioner's appendix, pages 14a to 48a. Judge Medina, writing for the Court, stated "* * * we have *carefully read and studied* the entire transcript of 6793 pages and the [illegible]5 exhibits and

have made new findings of fact in accordance with the *clear weight* of the evidence." (emphasis added) (cross-petitioner's appendix, page 17a). The Court of Appeals found that the Rincon Hills was forced aground by the tug Metropolitan No. 2 and the three scows it was towing and by the tug Long Branch and the two carfloats lashed to said tug. The Court said: "Thus strung out the two tows covered a distance of almost 900 feet, including the 100 feet between the two tows, through which 100 feet the tanker could not have passed, and they completely blocked off the tanker" (cross-petitioner's appendix, page 33a).

Cross-petitioner owned every vessel in one flotilla consisting of the Metropolitan No. 2 and three scows, and the railroad owned every vessel in the other flotilla consisting of the Long Branch and two carfloats.

The Court of Appeals held that cross-petitioner and Central Railroad Company of New Jersey were both liable *in personam* for the faulty navigation of their respective tows, consisting of the Metropolitan No. 2 which was towing three scows and the Long Branch which was propelling two carfloats alongside. The Court of Appeals also held that the tug Metropolitan No. 2 and the tug Long Branch were liable *in rem* for navigating themselves, together with the scows and the carfloats, so as to negligently force the Rincon Hills aground. The Court of Appeals further held that, since the scows and the carfloats were passive instruments under the control of their respective tugs and had no motive power of their own, the scows and carfloats were not liable *in rem* for having blocked the way of the tanker.

The tug Metropolitan No. 3 was a "helper" tug, which was not towing anything at the time in question, but was following behind the Metropolitan No. 2 and her scows and subsequently removed a scow being towed by the Metro-

politan No. 2 and took that scow elsewhere. The Court of Appeals held that the Metropolitan No. 3 did not contribute to blocking the Rincon Hills and therefore was not liable *in rem*.

Cross-petitioner and the railroad both sought to limit the amount of their liability to the values of their respective tugs. Deep Sea Tankers, Limited and Shell Oil Company, Incorporated, owner and charterer, respectively, of the Rincon Hills, sought payment of damages in full. The Court of Appeals held that cross-petitioner could limit its liability to the value of the Metropolitan No. 2 and did not have to include in its limitation fund the values of its scows; and that the railroad could limit its liability to the value of the Long Branch and did not have to include in its limitation fund the value of its carfloats.

Deep Sea Tankers, Limited and Shell Oil Company, Incorporated filed a petition for a writ of certiorari on November 12, 1958, (October Term, 1958, No. 511) to review that portion of the judgments of the Court of Appeals which permitted Metropolitan Sand & Gravel Corporation and Central Railroad Company of New Jersey to limit liability.

The time for Central Railroad Company of New Jersey to apply for a writ of certiorari expired on November 12, 1958, without any application by it. Apparently the railroad is satisfied that the Court of Appeals' action in reversing the findings of fact made by the District Court would not or should not be disturbed by this Court.

Metropolitan Sand & Gravel Corporation, however, filed a cross-petition.

A paragraph appears at the top of page 2 of the cross-petition which requires clarification in order to be understood without being mislead. That statement is: "Although the Court of Appeals *agreed* with the District Court that the tug Metropolitan No. 3 *and the three sand scows were*

without fault; it entered judgment reversing, *in its entirety*, the District Court's decree *exonerating* those four vessels." (emphasis added).

The quoted statement combines several facts, taken out of context, and by use of broad language gives an entirely incorrect impression. The tug Metropolitan No. 3 was not towing the three scows. The towing vessel was the Metropolitan No. 2, which was found at fault for crowding the Rincon Hills and for placing itself and the three scows in such a position as to block the Rincon Hills as she was approaching Dimond Reef. Furthermore, the Court of Appeals did not "agree" with the District Court that the scows were not at fault. There is a vast difference between the District Court's finding and the Court of Appeals' finding. The District Court found that the scows towed by the Metropolitan No. 2 were approximately 500 feet from the pier line and the Battery Sea Wall (Cross-petitioner's appendix 5a) and that the "Rincon Hills never at any time navigated with respect" to them (Cross-petitioner's appendix 8a). The Court of Appeals found that the scows were "at fault for being where they had no business to be at a time when a deep draft vessel was steaming up the Range." (Cross-petitioner's appendix 30a). The Court of Appeals held that "the tows were at fault for not keeping away from the immediate vicinity of the Range, where they interfered with the navigation of the tanker" (Cross-petitioner's appendix 31a) but that the scows were not liable* because they were passive instruments under the control of the Metropolitan No. 2 (Cross-petitioner's appendix 19a, 47a). The scows were thus not "exonerated" as alleged in the cross-petition, nor was there any "agreement" between the Courts below, and there is a vast difference between the scows not being present, and their being present but not liable.

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*The only way a vessel itself can be held liable is in rem.

The tug Metropolitan No. 3 is not involved in this appeal. As above noted, that tug was following the Metropolitan No. 2 down the East River and its objective was to remove a scow from the tow of Metropolitan No. 2 and take it elsewhere. The Court of Appeals found that the Metropolitan No. 3 was not at fault and so stated very clearly in its opinion (Cross-petitioner's appendix 23a). The statement in the cross-petition is partially accurate in that the Court of Appeals did reverse the decree of the District Court, but the phrase "reversing, *in its entirety*" is not at all accurate (Cross-petition, p. 2). The Court of Appeals, in reversing the decree of the District Court, remanded the cases for further proceedings not inconsistent with its opinion (Cross-petitioner's appendix 48a, 50a) and its opinion clearly showed that the reversal of the decree did not apply to the Metropolitan No. 3 (Cross-petitioner's appendix 23a).

The cross-petitioner's statement of issues and facts is also somewhat less than accurate and complete, and is also quite misleading to those not familiar with the complete record. Cross-petitioner employs an argumentative approach which, for the most part, is based upon a careful selection of excerpts from conflicting testimony. The excerpts are often taken out of context and joined with other excerpts in such a manner as to suggest error. The statement also suggests issues which cross-petitioner does not actually raise. A suggestion is made, for instance, that a question of law exists as to whether the Court of Appeals exceeded the scope of its authority to review findings of fact. The real reason for the cross-petition appears on page 14. Cross-petitioner there states that if this Court grants a writ of certiorari to Deep Sea Tankers, Limited and Shell Oil Company, Incorporated to review the question of cross-petitioner's right to limit liability, then cross-petitioner wants this Court to review the findings of fact made in the Courts

below.* Central Railroad Company of New Jersey, owner of the Long Branch and of the two carfloats, has practically conceded by not cross-petitioning that the facts as found by the Court of Appeals are correct and should not be disturbed. However, the cross-petitioner (see, for example, pp. 15, 16) makes many references to the railroad's tug and carfloats as blocking the Rincon Hills. Thus, the railroad remains passive while the cross-petitioner attempts to escape liability by fixing it upon the railroad. Parenthetically, it should be noted that the alleged value of the tug Long Branch is only $30,000, while the tug Metropolitan No. 2 is worth at least $100,000.

Argument

Since cross-petitioner's treatment of the facts is based upon a careful combination of selected excerpts, and attempts to create an issue of law concerning the application of whistle signals as required by the Inland Rules of the Road, it is necessary to refer briefly to the contested questions of fact.

The Rincon Hills was proceeding to her East River discharge berth through the waters between Dimond Reef (north of Governors Island) and Lower Manhattan. She was proceeding on the East River Range which is 300 feet northerly of Dimond Reef. The Range is provided for the specific purpose of guiding deep draft vessels safely past Dimond Reef. The area is shown on Exhibits 8 and 14, copies of which are attached hereto as Appendices B and C.

The Rincon Hills found her way blocked by the Metropolitan tow (the tug Metropolitan No. 2 with three loaded sand scows made up astern in single fashion) and by the

*See also page 9 of Metropolitan Brief in Opposition to Petition of Deep Sea Tankers et al, No. 511.

Jersey Central tow (the tug Long Branch with two railroad carfloats, one made up on each side). Both tows were proceeding outbound from the East River and were meeting the Rincon Hills in the waters between Dimond Reef and Lower Manhattan, the Jersey Central tow being close astern and somewhat to port of the Metropolitan tow.

The Court of Appeals found that "The two tows involved in this case, however, as will shortly appear, were huge, slow-moving, cumbersome flotillas and it requires little argument to demonstrate that they would constitute a substantial menace to the navigation of large vessels in the vicinity of Dimond Reef, especially on an ebb tide, unless kept clear of the Range." (Cross-petitioner's appendix, 18a)

The captains of both of these outbound tows were ignorant of the fact that the ebb current was still running out of the East River, and made no allowance for it. Neither tug had been furnished with available documents which would have shown that the ebb current was still running out of the East River. Both captains erroneously believed that it was slack water. They erroneously believed that slack water coincided with low water, and did not know that the current ran out of the East River for more than one hour after low water at the Battery (Cross-petitioner's appendix 20a).

Having made no allowance for the ebb current still running out of the East River, respondents' tows were swept by the ebb current down to and across the center line of the deep water channel between Dimond Reef and Lower Manhattan, and even further south across the Range line (which line is only 300 feet to the north of Dimond Reef). The tows were then swept crabwise, along and south of the Range Line, across the path of the Rincon Hills. The movements of the vessels are depicted on Exhibits 8 and 14, Appendices B and C.

The Rincon Hills blew a one-whistle signal to the tows. Neither tug blew a signal of its own and neither tug answered the Rincon Hills. Thereupon the Rincon Hills blew the danger signal and to avoid collision with the tugs and tows, the Rincon Hills was forced to stop her engines and to turn to her right, thus taking her off the Range, and directly toward Dimond Reef. Both tugs failed to answer the alarm signal of the Rincon Hills, and both tugs failed to take any action in response thereto. The sequence is shown on Exhibit 8, Appendix B.

The action of the Rincon Hills in turning off the Range and to her right toward Dimond Reef just barely avoided collision with the tows, the clearance being estimated to be as little as 10 feet.

When the Rincon Hills had been forced to the point where collision with the Metropolitan tow was just barely avoided and the Jersey Central tow was just pulling across the bow of the Rincon Hills, the pilot of the Rincon Hills ordered her engines put full ahead and her rudder hard left. The helmsman made a helm error which the Court of Appeals found was *in extremis*, and therefore excusable.

Cross-petitioner, in presenting its abbreviated version of the facts, ignores two important points. First, the fact that all of the tugs and tows were in motion at all times as they came down the East River, met the Rincon Hills, embarrassed her navigation, and then continued on their way. Second, the Rincon Hills was also in motion, in the opposite direction, as she entered the East River, was forced off the Range, and thereafter grounded.

The events are isolated by the cross-petitioner, thereby giving an erroneous impression. The two principal events isolated by cross-petitioner are: (1) the time when the Captain of the Rincon Hills emerged from the chartroom into the wheel house and saw the Long Branch; and (2) the time when the helmsman, seeing the Long Branch crossing

from starboard to port, reacted to an order to turn to port (and into apparent collision) by instinctively turning to starboard.

The Rincon Hills was on the Range when she blew her one-whistle signal to the Metropolitan tow and the Long Branch tow. There was no answer from either tug and no signal of their own. The Rincon Hills then blew the alarm, stopped her engines and her rudder was turned to her own right. The ebb current was carrying the Rincon Hills to the south of the Range. The stopping of her engines and the right rudder, while the ship was affected by the current, took the Rincon Hills to the south of the Range. The Metropolitan No. 2 and her scows, *after forcing the Rincon Hills into a position of danger below the Range,* were no longer an *immediate* threat to navigation. The Metropolitan tow had done her damage and was passing by. However, the tug Long Branch which was following the Metropolitan No. 2 was then crossing the bow of the Rincon Hills. It was at this time that the Captain of the Rincon Hills came out of the chartroom and saw the Long Branch.

Cross-petitioner states that the Rincon Hills went right to avoid hitting the Jersey Central carfloats and not the Metropolitan tug and tow (Cross-petition pp. 7-8, 16).

This is putting a too liberal construction on the testimony of the Master. The Pilot had the conn (control of the ship) not the Master, who was in the chartroom. Cross-petitioner's flotilla cleared the bow of the Rincon Hills *before* the railroad flotilla, therefore, when the Master rushed out of the chartroom his thoughts and vision were wholly occupied with the carfloats which were just then crossing his bow (Cross-petitioner's appendix 22a). The Court of Appeals found, and rightly so, that cross-petitioner's flotilla was at fault for being where she had no right to be, namely in the waters near the Range designed for deep draft ships, at the time when the Rincon Hills

was on the Range or steadying on a course past Dimond Reef (Cross-petitioner's appendix 30a, 31a).

Cross-petitioner attempts to confuse the issue by stressing those events which related to the Long Branch and its carfloats while ignoring the fact that the *initial* right rudder movement was caused by *both* the Metropolitan No. 2 and the Long Branch and that *both* tows had *already* forced the Rincon Hills south of the Range (Cross-petitioner's appendix 38a, 39a).

The Rincon Hills because of her deep draft was required to stay on the Range. This was not true of the two flotillas involved, they had the entire river in which to maneuver. Yet they failed to keep away from the Range and blocked the Rincon Hills from using the Range and the waters near the Range.

Cross-petitioner contends (pp. 10, 17) that the helmsman's error was not one *in extremis* because it is asserted that he was not in a position to exercise discretion or judgment as to the manner in which the Rincon Hills should be navigated; and cross-petitioner cites in support of its contention the case of *A. H. Bull S. S. Co.* v. *United States*, 34 F. 2d 614 (2 Cir. 1929). The *Bull* case does not support petitioner's argument, because in the *Bull* case the vessel asserting the defense of error *in extremis* was the vessel which herself had brought about the dangerous condition. A contrary situation exists in the present case, the Court of Appeals having found that the navigation of the Rincon Hills did not contribute to bringing about the imminent danger of collision which caused "the natural and instinctive reaction of the helmsman" in starting to turn the wheel right whereas the pilot had ordered hard left (Cross-petitioner's appendix 39a).

Cross-petitioner by a rather circuitous course is contending that the Court of Appeals erred in holding a head to head meeting situation was involved. When the Rincon

Hills entered onto the Range, proceeding *easterly*, the pilot blew one blast as provided for by the Inland Rules for Navigation, 33 U. S. C. § 203. One blast signifies that the initiator intends a port to port passing. The pilot had to know the intention of both flotillas. The lack of tidal data on the part of the tug Masters made for a dangerous situation. The tows were crabbing (sideways motion because of the ebb current) and were being swept along the Range in a *westerly* direction. With the Rincon Hills moving easterly, and the flotillas westerly, it definitely was a meeting situation.

The question whether vessels are meeting or crossing is determined by the "reasonable inference to be drawn as to a vessel's future course from her position at a particular moment, and this greatly depends on the nature of the locality where she is at that moment." *The Victory and The Plymothian*, 168 U. S. 410, 421 (1897). The respective headings of the vessels at any one given time are immaterial, it is the intended projected courses which show whether a meeting situation is involved. *The Panther*, 79 F. 2d 625, 626 (2nd Cir. 1935).

Cross-petitioner cites a number of cases for the proposition that this was not a meeting situation (Cross-petition p. 18). All these cases involved vessels on steady or relatively steady courses which if left unchanged would have allowed a safe passage. But in the present case the pilot could not determine, in the absence of a signal reply from them, the intentions of the tows. Prudent navigation requires that the intentions of another vessel standing into one's projected course be ascertained. The pilot of the Rincon Hills saw the situation as one of meeting head to head. The Inland Rules require a whistle signal of one short blast for a port to port passing. See *The Eugene F. Moran*, 154 Fed. 41 (2nd Cir. 1906); *The Sandmaster*, 105 F. 2d 1009 (2nd Cir. 1939).

Cross-petitioner is confusing the issue when it states that "one short blast of the whistle signifies intention to direct course to own starboard." (Cross-petition, p. 19) This is Rule 80, Pilot Rules for Inland Waters, Title 33, Code of Federal Regulations 80.03. The two rules are different but not inconsistent. Both rules are used in Inland waters but to signify somewhat different intentions. In *Postal Steamship Corp.* v. *El Isleo*, 308 U. S. 378 (1940) this Court stated that where the Inland Rules and the Inspector's Rules (Pilot Rules) are not directly inconsistent, the latter are valid and coexist with the former. In any event the pilot was correct in making the one blast signal required by the Inland Rules. See also *The Fulton*, 54 F. 2d 467 (2nd Cir. 1931).

This Court has held that these passing signals must be answered. *The New York*, 175 U. S. 187, 206-07 (1899). In the present case neither tug answered the one-blast signal of the Rincon Hills, nor the danger signal for that matter (Cross-petitioner's appendix 29a). If the tugs did not wish to assent to the passing signals of the Rincon Hills they should have blown the danger signal, yet neither one made any signal whatsoever.

CONCLUSION

The cross-petition does not raise any questions of law of general importance but, instead, asks this Court to review questions of fact decided in the lower courts and does not come within that class of cases over which this Court should exercise its discretionary jurisdiction. In any event, the findings of the District Court were not only erroneous, but clearly erroneous and required reversal by the Court of Appeals.

On the basis of the foregoing we submit that this Court should deny the cross-petition. If, however, the Court

should wish, in dealing with the merits of the cross-petition, to have before it, in more detail, points and supporting testimony which show that the decision of the District Court required reversal, we attach hereto an Appendix containing such points and excerpts from the testimony, together with copies of pertinent Trial Exhibits.

Respectfully submitted,

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APPENDIX A

POINTS AND EXCERPTS FROM THE TESTIMONY

1. As to the position of the Metropolitan tow when it began to pull in toward South Ferry.

While the tug captain, Hutton, claimed at the trial that it was after passing Pier 9 that he began to pull in to starboard (318a),[1] it was developed upon cross-examination that he had given a statement (Exhibit BBB) to Metropolitan counsel only 17 days after the grounding of the Rincon Hills, which statement Hutton had signed and to the truth of which he had sworn. Over the objection of Metropolitan counsel (311a), Judge Goddard ordered the production of such statement (312a). A copy of Hutton's statement, made on December 13, 1951, is attached hereto as Appendix D. In his statement, Hutton swore:

> "* * * After passing below the Brooklyn Bridge the tow was *favoring the middle of the river* and when the tow was about off Pier 9, New York I observed a tanker, which later proved to be the RINCON HILLS. I should judge that this tanker at that time was about abeam of the light on the northerly end of Governors Island and approximately 1000 feet off the light. The METROPOLITAN No. 2 and her tow continued down the river and when approaching or in the vicinity of *Pier 5* we began to pull in toward South Ferry so as to be in a position to round the Battery." (Emphasis added).

Judge Goddard recognized the conflict between Hutton's direct testimony and the affidavit given by him within a few days after the stranding. Judge Goddard also fully

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[1]Unless otherwise stated, page references hereinafter are to pages of the Appendix to the Brief of Deep Sea Tankers, Limited, et al. in the Court of Appeals, and filed in this Court under Docket No. 511.

recognized the importance of fixing the position in the East River at which the Metropolitan No. 2 began to pull in toward South Ferry. Because of the unreliability of Hutton as shown by this contradiction, Judge Goddard himself questioned Hutton closely and brought out that the Metropolitan No. 2 was favoring the middle of the river and that it was *off Pier 5* that the Metropolitan No. 2 began to pull in toward South Ferry (319a, 320a).

> "The Court: Let us see, Captain. You just told us, and *listen to me, because I am trying to straighten you out*, you just told us you were favoring the middle of the river when you were about 15 feet south of the Brooklyn Bridge. You remember that?
>
> The Witness: Yes.
>
> The Court: That is right, isn't it?
>
> The Witness: That is right.
>
> The Court: Yes. Then you have just said you don't favor the middle of the river as you come down.
>
> The Witness: That is right.
>
> The Court: Therefore, you must have some time, headed more toward the shore, isn't that right?
>
> The Witness: That is right, you follow the pierheads down.
>
> The Court: When did you turn in towards shore, change your course to head in towards shore?
>
> The Witness: That is a hard way to answer it, Judge. As you are standing up there steering, you don't directly take an object and push it aft. You steer your boat you come on down here just as nice as can be. You don't——
>
> The Court: Captain, *you must remember that you have gone into a great deal of detail in your testimony in reply to Mr. Hanan's questions. All that you are being asked now is when did you change your heading from about—favoring the middle of the river.*[2]

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[2]Emphasis added in this and later quotations from transcript of testimony.

The Witness: Well, we have been changing the heading all the way down the river. We are steering the boat and judging from the pierheads.

The Court: Well, *I won't try any further.*"

And at 321a:

(*By Mr. Haight*)

"Q. Captain, if you put your attention again, please, on the sentence at the top of page 2, after you described, on first sighting the tanker, when you were off Pier 9, you said the Metropolitan No. 2 and her tow continued down the river. A. Yes.

Q. And *when approaching or in the vicinity of Pier 5 we began to pull in toward South Ferry* so as to be in a position to round the Battery. A. *That is the statement.*

Q. Is it not a fact that it was *off Pier 5* that you first—— A. I won't say——

Q. (Continuing) —altered your course? A. You are steering the boat and tow. We are working——

The Court: Now, Captain, you seem to be a pretty intelligent person. *That is a simple question.*

The Witness: Yes, but you don't directly go that way. You are steering the boat along this edge.

The Court: What did you say in the statement?

The Witness: Statement says off Pier 5 I pulled in.

The Court: Is that true or not?

The Witness: *Well, it must be right. I signed it.*"

Hutton was an evasive witness. When asked about the width of the East River, he sought to avoid the issue (316a):

"A. This is all a lot of crap——

Mr. Hanan: Now, Captain, stop it.

The Witness: No fooling, Jesus——

Mr. Hanan: Now, just answer the question. Hush."

Judge Goddard closely questioned Hutton, during cross-examination, as to whether he watched the Rincon Hills after the tanker blew her one-whistle signal, which was heard by Hutton on the Metropolitan No. 2 (327a-328a):

By Mr. Haight.

Q. Well, you were watching her, weren't you, Captain Hutton? A. Glancing, yes.

Q. Did you look at her when she blew the one-whistle signal? A. No. Paid no attention to her.

The Court: You what?

The Witness: No.

The Court: You did not look at her?

The Witness: No.

Q. After you heard the one-whistle——

Mr. Hanan: Captain, will you read your statement before you answer the questions now ?

The Witness: Well, we heard the one whistle between Pier 4 and this long rack, and I am about three or four hundred feet off this rack——

Mr. Hanan: Captain, will you read your statement on page 2, what Mr. Haight is questioning you about?

Mr. Haight: It is now one o'clock. I have no objection to stopping for lunch and letting him read his statement and continue after lunch.

Mr. Hanan: Well, let him finish his answer.

The Witness: Well, it is a good thing we all ain't got good education around here.

Mr. Hanan: Do you see where it starts 'The Metropolitan No. 2'?

Mr. Haight: We have to do the best with what we have, all of us, Captain.

Mr. Hanan: Mr. Haight is questioning you about page 2 here. Now you read the language that he is using in his questions so you will know what he is talking about.

The Court: Well, *I want to ask him now what his testimony is.*

By the Court.

Q. You just said that you heard the Rincon Hills blow a whistle but you did not look at her; did not see her, is that right? A. I heard the whistle.

Q. But *you did not look at her?* A. No, because I was——

Q. *You did not look at her?* A. I had other things to draw my attention.

Q. *You did not look at her?* A. No.

Q. When did you look again? When did you look? A. After we were gone by. That is, the tail end of our tow was gone by the ship; because I had this Ellis Island Ferry Boat to contend with coming up inside of me.

The Court: Well, do you want to take our recess now?

Mr. Haight: Yes."

2. As to the position of the Jersey Central tow when the Rincon Hills blew her one-whistle signal.

Hutton on the Metropolitan No. 2 *did* hear the one-blast signal blown by the Rincon Hills, and his sworn statement (Exhibit BBB, copy attached) *taken by his own counsel* and confirmed by Hutton at the trial (328a) is of vital importance. It places the Long Branch and her carfloats *off Pier 9 and out in about the center of the river* at the time when the Rincon Hills blew her one-whistle signal. Hutton swore (page 2) that he:

> "* * * looked around to see for what vessel the signal was intended. I observed the tug Long Branch with a carfloat on each side *up off Pier 9 and out in about the center of the river bound down the river* and concluded that the tanker Rincon Hills was signalling to the tug Long Branch."

This is a specific statement, made only 17 days after the casualty, placing the Long Branch tow "up off Pier 9

and out in about the center of the river bound down the river" at the moment when the Rincon Hills blew her one-whistle signal.

When confronted at the trial with his affidavit, Hutton tried hard to escape from the damaging statement which he had made about the Jersey Central tow, before the two tows were represented by different members of the same law firm.

In this connection it is interesting to note that Metropolitan, in its answer to the libel, expressly pleaded as an affirmative defense that any damage sustained by the libelants "was caused by or contributed to by a person or persons, vessel or vessels for whose acts" respondent Metropolitan was not liable (662a). This allegation is a clear reference to the *Jersey Central tow*, as shown by the fact that the statement (Exhibit BBB, page 2), given by Captain Hutton of the Metropolitan No. 2 *to his own counsel* seventeen days after the stranding of the Rincon Hills, reveals that Hutton concluded that the one-whistle signal given by the Rincon Hills, at the beginning of the events leading directly up to her grounding, was blown *to the Jersey Central tow.*

Again, Judge Goddard took an active hand in the interrogation of Hutton (333a):

> "The Court: Captain, let us be a little clearer about these things. We have taken a lot of time.
>
> *By the Court*:
>
> Q. You heard the one-whistle blown? A. That is right.
>
> Q. Did you think it was for you? A. No.
>
> Q. What did you do? Did you look around to see if it was blown to somebody else? A. Well——
>
> Q. *Answer that yes or no.* Did you look around to see if it was intended for some other craft? Did you look around? A. Yes, I might have looked around, yes.

Q. *Not whether you might have.* Did you? A. Yes, I looked around.

Q. You looked around and you saw the railroad float up the river, just about off Pier 9, wasn't it? A. Yes.

Mr. Haight: Yes, off Pier 9.

The Witness: Yes, off Pier 9.

Q. *About the middle of the river as you just testified to?* A. Yes.

Q. Now you want to stand on that testimony now, do you? A. *Yes, I will stand on it.*

* * *

And at 334a:

"The Court: Did you think it was blown to you or some other craft?

The Witness: It wasn't blown at me.

The Court: *That is not what I asked you.*

The Witness: Well, that is the only way that I could answer, that I don't steer another man's boat.

The Court: When you heard it——

The Witness: Yes.

The Court: —you told us you didn't think it was intended for you, is that right?

The Witness: That is right.

The Court: You also told us you looked around to see——

The Witness: I looked around at my tow and I seen the carfloats.

* * *

At 333a, 335a:

By Mr. Haight:

Q. Captain Hutton, will you answer the question. A. The whistle, who he was intending to?

Q. Yes. A. I don't know.

Q. My question is, did you not in December, 1951, 17 days after these events, did you not then state in a sworn affidavit that when you looked and saw the Long Branch and carfloats as you described in your statement and again now, you concluded

that the tanker Rincon Hills was signaling the tug Long Branch? Is that true?

Mr. McKernan: May I have an objection and exception to that question?

The Court: Objection overruled.

Mr. McKernan: May I have an exception to the ruling on that question?

The Court: Yes, certainly.

Mr. Hanan: Read the statement, Captain, before you answer.

The Witness: *Yes, but "conclusion" can't you put another word in there?*

* * *

The Court: Now, Mr. Hanan has asked you to read your statement.

The Witness: Yes, I know.

The Court: And after you read it will you tell us whether it is true.

The Witness: *Well, according to the statement there, it must be true, when I signed for it.*

The Court: Then you want to say it is true, is that right?

The Witness: *The statement is true.*

3. As to it being a meeting situation.

When pilot Rowohlt blew the one-whistle signal, the Metropolitan tow had been swept by the ebb current, coming out of the East River, to a position where "about the middle half of the last scow was on *the Range*" (39a). The position of the sand tow was marked by Rowohlt on Exhibit 8 as MET 1.

When the ferry Robert E. Shannon was herself crossing the Range Line, on her trip from Manhattan to Governor's Island, Captain Henry Hoffmann saw the Metropolitan tow across the Range Line, *with the middle scow on the line of the Range and her last scow to the south of the Range Line and toward Dimond Reef* (76a). At this

time, Captain Hoffmann also looked to his right and saw that the Rincon Hills was "rounding to get on the Deep Water Range. She was already headed toward the East". (64a). The positions of the Metropolitan tow and of the Rincon Hills, when the ferry Shannon was on the Range Line, are marked by Captain Henry Hoffmann on Exhibit 14 as Sand Tow 2 and Tanker 2.

When the Rincon Hills blew her one-whistle signal, by which time the ferry Shannon had completed her trip and was in her Governors Island slip, Captain Henry Hoffmann "looked toward the *sand tow* which I figured the tanker meant the whistle for. I then found that *the whole sand tow had drifted down in the vicinity of the Dimond Reef*" (66a). The Metropolitan tug "was heading toward the ferry slips like he was *trying to get out of the way of the tanker*" (67a).

McConnell on the tug William Meseck, on the starboard side of the Rincon Hills, saw the Metropolitan tow "starting over from about Pier 9, Brooklyn, headed for the New York Shore." At the same time he saw the Jersey Central tug and carfloats *"right around the stern of the Metropolitan."* At that time "the Jersey Central was *a little over to Brooklyn more* and he was *coming up alongside the Metropolitan* on his port side" (184a).

Captain Edward Hoffman, on the tug C. Hayward Messeck, on the port side of the Rincon Hills saw the Metropolitan tow "coming down off Pier 6 in the East River". Captain Hoffman was intending to bring his tug alongside the Rincon Hills to make fast on her port bow, but Hoffman "was prevented from reaching the bow of the ship", because "this *sand tow swung down across the bow of the ship,* and there wasn't room for me to go up there, up to the bow of the ship" (96a). The Metropolitan tow forced Captain Hoffman to bring his tug "in alongside about 15 feet off" the Rincon Hills, in order to avoid collision be-

tween the sand tow and the tug. The stern of the last scow of the Metropolitan tow cleared Captain Hoffman's tug by about 40 feet (97a). The Metropolitan No. 2 *"didn't get the tail end of his tow any further to the right* until after he had passed the ship" (101a).

Whelan, on the ferry Ellis Island, saw both tows "being swept down with the tide" and knew that the situation between the two tows and the Rincon Hills would be a very close one with serious danger of collision (83a). The tug Metropolitan No. 2 "was pulling like heck to get away from across the bow of that ship" (88a).

When pilot Rowohlt blew the one-whistle signal, the Long Branch tow was following close behind the Metropolitan tow and on that tow's port quarter. The Long Branch tow also "came on the Range" (40a).

Captain Henry Hoffmann, on the ferry Shannon, in her Governors Island slip, when the Rincon Hills blew her one-whistle signal "saw a Jersey Central tugboat with two carfloats just north of the ventilator,* in the northern direction of the ventilator and *toward the Dimond Reef"* (68a).

Captain William Tuttle, in command of the ferry Gold Star Mother, on her trip from Staten Island to Manhattan, was in the vicinity of the Range Line and he "saw a tug and carfloat in the vicinity of the Range" (492a). The carfloat tow was across the bow of the tanker at about a 45-degree angle. The carfloat tow "was coming from the starboard side of the tanker toward the port side" (492a). Captain Tutle also observed a hawser tow ahead and "very close" to the carfloat tow (493a). The relative positions of the ferry Gold Star Mother, the Rincon Hills, the carfloat tow, and the hawser tow are marked by Captain Tuttle on Exhibit 111.

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*This is the ventilator for the Battery-Brooklyn Tunnel. The ventilator is northeast of Governors Island.

Pilot Rowohlt saw the Long Branch tow carried by the ebb current from a position just north of the Range line, when pilot Rowohlt blew the one-blast signal, to a position south of the Range Line, when he blew the danger signal. These two positions of the Long Branch tow are marked by Rowohlt upon Exhibit 8 as CRR 1 and CRR 2. Rowohlt testified that "when I *heard no reply* from either vessel, I gave the alarm and ordered the engines to be stopped". In the meantime "As the tow was progressing down and making a leeway as much as headway, I ordered the wheel to right" (40a).

Mate Richard, of the Rincon Hills, saw the Long Branch tow between two and three points (between 22 and 33 degrees) on the ship's *starboard* bow (136a).

Captain Mullock approved the action of pilot Rowohlt in taking the Rincon Hills off the Range and turning to her own right because "that is the way *I wanted* her to go because otherwise we definitely would have cut those barges and tug in two" (121a). "They were crossing from our right to our left and we had to swing to the right to keep out of the way of them" (121a, 122a).

Wilcox, the helmsman of the Rincon Hills "saw on the starboard bow two carfloats and a tug. As these carfloats proceeded on their course as they passed across the stem and underneath the bow of the Rincon Hills so close that it looked like we were going to ram them" (194a, 195a). As shown above, this was the reason why Wilcox reacted by putting the wheel to the right when pilot Rowohlt ordered hard left.

Philip, purser on the Rincon Hills, with two years experience as an able seaman (157a) heard the Rincon Hills blow the danger signal and immediately went on deck on the starboard side. He saw the Long Branch tow "about 2½ points on the starboard bow of the Rincon Hills" (159a). The tug and carfloats "were headed across our bow at a narrow angle" (159a).

To McConnell, on the deck of the William Meseck, on the starboard side of the Rincon Hills, it appeared that the Long Branch tow was "going across the bow of the ship" (184a) "coming from Brooklyn, headed for New York" (185a).

Captain Edward Hoffman, on the tug C. Hayward Meseck, on the port side of the Rincon Hills, was prevented by the Long Branch tow from bringing his tug forward to make fast on the port bow of the Rincon Hills. "There was a pair of carfloats coming down with a Jersey Central tug, and they *swung down across the bow of the ship*, so I had to lay back. It wasn't safe to approach the bow of the ship" (98a). The carfloats cleared the Rincon Hills by "about 10 feet" and cleared Captain Hoffman's tug by "possibly 20, 25 feet" (98a). This was the *second time* that Captain Hoffman had been prevented from going forward with his tug to make fast on the port bow of the Rincon Hills. The first time was when the Metropolitan tow prevented him from doing so.

The Rincon Hills was on the Range when she blew her one-whistle signal to the Metropolitan tow and to the Long Branch tow.

Pilot Rowohlt was holding the actual heading of the Rincon Hills about 8-10 degrees to the left of the Range Course, so as to offset the effect of the ebb current coming out of the East River and to hold the vessel steady on the Range Course (36a).

McConnell, on the tug William Meseck, on the starboard side of the Rincon Hills, "waited for the ship to come around and get on *the Range. Then* I started to move alongside of her" (182a). When the Rincon Hills blew the one-whistle signal McConnell was "starting in to go alongside" (182a), and the Rincon Hills was on the Range (183a). The Rincon Hills was still proceeding on the Range when she blew the alarm signal to the two tows (183a).

Captain Henry Hoffmann, in command of the ferry Lt. Col. Robert E. Shannon, lying in her slip on Governors Island, looked at the Rincon Hills when she blew her one-blast signal and "she appeared to be exactly on the Deep Water Range" (66a).

The foregoing shows that the Rincon Hills and both tows approached each other substantially along the Range line on opposite courses. While the bow of each vessel involved may not have been headed directly toward the approaching vessel, the courses actually made good constituted "meeting head and head, or nearly so". It has been so held in *Coney Island* v. *Exporter,* 131 Fed. 2d 902; 1943 A. M. C. 34.

4. As to the one-whistle signal and the danger signal blown by the Rincon Hills.

In his opinion (669a), Judge Clancy states with reference to the Long Branch not answering the one whistle signal blown by the Rincon Hills, that "this *omission* was in no respect negligent since the Long Branch was not on a crossing course with respect to the Rincon Hills nor head to head nor on any other course that required a signal."

As to the Metropolitan tow, Judge Clancy states (668a) "When off pier 4 with her tow following relatively straight behind, the tug captain heard a one-blast signal from the Rincon Hills. He did not answer, assuming from the respective positions of tanker and tow that the blast was not intended as a signal directed at him."

Judge Clancy makes no reference whatsoever to the provisions of the Inland Rules or to the Coast Guard Rules which require an exchange of whistle signals between the tows and the Rincon Hills.

Article 18 of the Inland Rules (33 U. S. Code 203) imposes a "duty" on vessels approaching each other head and head, or nearly so, to pass on the port side of each

other "and either vessel *shall* give, as a signal of her intention, one short and distinct blast of her whistle, which the other vessel *shall answer* promptly by a similar blast of her whistle, and thereupon such vessels shall pass on the port side of each other." (Emphasis added.)

The U. S. Inspectors' (Coast Guard) Rules for Inland Waters, Title 33, Chapter III, Section 312.3, known as the *"Half Mile Rule"* provides: "The signals for passing, by the blowing of the whistle, shall be given and answered by pilots, in compliance with the rules in this part, not only when meeting 'head and head', or nearly so, but *at all times when the steam vessels are in sight of each other,* when passing or meeting at a distance *within half a mile of each other, and whether passing to starboard or to port."* (Emphasis added.)

The failure of Judge Clancy to apply the Rules requiring an exchange of whistle signals between the tows and the Rincon Hills is all the more astonishing in view of the fact that Molloy, captain of the Long Branch, admitted on questioning by Judge Goddard and on cross examination that such Rules required the tows to answer the one-whistle signal given by the Rincon Hills (437a).

> "THE COURT: What do you think the rule is, Captain, if the two Vessels are approaching each other and one blows a one whistle—what does the other vessel do?
>
> THE WITNESS: Port-to-port passing——
>
> THE COURT: Yes, but what does it do?
>
> THE WITNESS: Answer him with one.
>
> * * *
>
> *By Mr. Haight:*
>
> Q. Captain Molloy, are you also familiar with the Coast Guard Rule known as the Half Mile Rule, and which is, for reference of Court and counsel, Section 312.3, as reproduced in Griffin on Collision, page 699.

Let me read this paragraph:

"The signals for passing by the blowing of the whistle shall be given and answered by pilots in compliance with the rules in this part not only when meeting head and head or nearly so but at all times when the steam vessels are in sight of each other when passing or meeting at a distance within half mile of each other and whether passing to the starboard or port.'

* * * *

Q. Captain Molloy, are you familiar with that rule?

A. Yes, sir, I am.

Q. Now, in your experience and understanding does that rule apply to vessels passing between Manhattan and Governors Island?

A. Yes, sir."

The error of the District Court in failing to apply the Rules which required the tows to signal to the Rincon Hills is vividly emphasized by the foregoing testimony of the captain of the Long Branch, which shows that at the trial even he realized and admitted that he should have signalled to the Rincon Hills (437a).

5. As to the Rincon Hills turning to her right, off the Range and toward Dimond Reef when she blew the alarm signal.

The refusal of the District Court to find that the Rincon Hills turned to her right, off the Range and toward Dimond Reef, when she blew the alarm signal is decisively contradicted by the testimony of the ship's Pilot, Helmsman, Second Officer, and Master; and by the testimony of disinterested witnesses.

Pilot Rozwohlt

"Q. Will you tell us what you did next after you blew the one short blast and received or heard no reply blown to you? A. When I heard no reply from either vessel, I gave the alarm and ordered the engines to be stopped.

Q. Did you give any order with respect to the ship's wheel? A. Yes, sir. As the tow was progressing down and making a leeway as much as headway, I ordered the wheel to right." (40a)

Helmsman Wilcox

"Q. Mr. Wilcox, you stated in your testimony that the order before the pilot's hard left order was amidships, is that correct? A. That is right.

Mr. McKernan: I submit the witness did not so testify.

Mr. Haight: This is the witness's testimony a moment ago.

Q. Is that correct, Mr. Wilcox? A. That is right, sir.

Q. And before the amidships order what had the pilot ordered? A. Right wheel." (197a)

* * *

Q. Mr. Wilcox, coming back for a moment to the right wheel order which you testified preceded the order amidships, what is your best estimate of the length of time that you had the wheel right at that time? A. Well, it was over 30 seconds.

Q. And what is your recollection as to how far you put the wheel right on that occasion? A. Well, I would say about 2 or 3 turns, as best I can remember." (198a)

Second Officer Richard

"Q. At the time the pilot gave the stop order to the engines at 1225, will you tell us whether or not he

took any action with respect to any whistle signal? A. He blew a danger signal.

Q. Did he give any order with respect to wheel movement? A. Yes, sir, he did.

Q. What order did he give? A. Right wheel.

Q. Did you take any action yourself with respect to whether or not the right wheel order was carried out? A. Yes, sir, I did.

Q. Will you tell us what you did? A. Well, I repeated the order to the wheelsman and he repeated it after me and carried it out.

Q. Did you observe the wheelsman to see whether he carried out the wheel order? A. Yes, sir.

Q. What did you see him do? A. I saw him turn the wheel to the right, sir.

Q. Can you tell us how far he turned the wheel to the right? A. Well, I estimate a couple of turns, sir. (139a)

* * *

Q. Going back for a moment to the right wheel order you mentioned, will you tell us whether or not the Rincon Hills responded to that right wheel order? A. Well, as I recall, sir, she seemed to be swinging to starboard." (144a)

Captain Mullock

"Q. Captain, when you came and stepped into the wheelhouse from the chartroom on hearing the danger signal blown by the Rincon Hills, did you make any observation as to the state of the helm at that time? A. The helm was amidships—no, I just want to correct myself on that. I believe the helm was just being put amidships. It had been to starboard and it was just being put amidships.

Q. Now, when you stepped from the chartroom into the wheelhouse did you make any observation as to the ship's head? A. The ship's head appeared to be swinging to starboard. (108a)

* * *

Q. Captain Mullock, when the pilot gave the order amidships, after you came into the wheelhouse

and the chartroom, will you tell us whether or not at that moment the Rincon Hills was swinging? A. Yes, sir, she was swinging to starboard. (115a)

Captain Henry Hoffman, Master of the Governors Island Ferry Lt.-Col. Robert E. Shannon, which was in her slip on Governors Island.

"Q. After the tanker blew the alarm signal did you continue to observe her? A. Yes, sir, I did. She had moved up about a little abreast of our ferry slip, and at that time it looked like her engines were stopped because she seemed to be losing way, and the sand tow at that time was pretty close, and so was the carfloats.

Q. Now, as you observed the tanker at this time did you notice anything with respect to her bow wave? A. Her bow wave had cut down to almost a stop. It was just a ripple.

Q. Did you make any observation as to whether or not the tanker stayed on the range course? A. No, she was falling off slightly toward the reef; she was veering." (69a)

Captain McConnell, on the tug William Meseck, on the starboard side of the Rincon Hills.

"Q. When the Rincon Hills blew the alarm signal what at that moment was the position of your tug William Meseck? A. I was just still in position coming alongside like, still starting in alongside of her there.

Q. When the Rincon Hills blew the alarm signal can you tell us whether or not at that time she was on the East River range? A. Yes, sir, she was.

Q. After the Rincon Hills blew the alarm signal will you tell us in your own words what then happened. A. Well, as she came alongside——

Q. Speak loud and slowly. A. As she came alongside there, the ship started taking a nosedive to the starboard and I kept going with the ship. I

seen she was coming over, so I got away from her altogether.

Q. When you say a nosedive to starboard, are you speaking, with reference to the ship—— A. Ship went to the right." (183a)

Purser James Phillip

"Q. What kind of a signal was it? A. I heard a danger signal.

Q. When you heard that danger signal where were you? A. I was seated in my cabin.

Q. What were you doing at that time in your cabin? A. I was counting money, getting ready to pay off members of the ship's crew.

Q. What did you do when you heard the danger signal blown on the Rincon Hills? A. I picked up the money, put it in my pocket and went out on deck.

Q. Which deck did you go out upon? A. I went out on the midships deck on the starboard side." (158a)

* * *

"Q. After you came out on the starboard side of the amidships deck, did you make any observation with respect to that heading or course of the Rincon Hills thereafter? A. When I came out on deck we were headed towards Brooklyn, and then shortly thereafter we had started a swing to starboard." (161a)

In the face of all of the foregoing testimony showing that when the Pilot of the Rincon Hills blew the danger signal he also ordered her rudder put to right, and that this maneuver was carried out and took the Rincon Hills off the East River Range and toward Dimond Reef, it is clear error, we submit, for Judge Clancy to "refuse" (676a) to find that such right wheel order was given and executed when the Rincon Hills blew the danger signal.

Judge Clancy asserts (675a) that his reason for refusing to find that this right wheel order was given and

executed is because of a contradiction which Judge Clancy believed existed between the pilot's testimony at the Coast Guard hearing and at the trial. The opinion does not support this assertion by referring to any portion of the pilot's testimony at the Coast Guard hearing or at the trial. In fact, there was no such contradiction. The record shows (Exhibit 10) that at the Coast Guard hearing Pilot Rowohlt was *not interrogated* as to the right wheel order given and executed when the alarm signal was blown, since the attention of the Coast Guard Examining Officer was directed primarily to the helmsman's reaction, at a *later* time, in putting the wheel to the right when the pilot ordered hard left, at which time it appeared to the helmsman that the Rincon Hills was going to ram the Jersey Central tow, although collision was finally avoided by a few feet. Judge Goddard recognized that any suggestion of contradiction by the pilot was wholly unfair if at the Coast Guard hearing the pilot had not been interrogated as to the right wheel order given at the time of the alarm signal (516a-2, 516a-3) to show that Pilot Rowohlt was *not* interrogated on this point at the Coast Guard hearing, the transcript of his Coast Guard testimony was received in evidence as Exhibit 10 (516a-3).

Even if Pilot Rowohlt had contradicted himself on this point, which is *not* the situation, nevertheless the reason asserted by Judge Clancy for refusing to find the right wheel order, given and executed when Pilot Rowohlt blew the danger signal, is a wholly insufficient reason. The giving and the carrying out of this right wheel order is fully established by the testimony, above quoted, of *seven witnesses.*

It was held in the *Peter Rinelli,* 252 F. 211 (1922) that the testimony of other navigators is vitally important. And, in *Coney Island-Exporter,* 131 F. (2d) 902 (1942) the Second Circuit held that even if the master of a

ship becomes confused or contradicts himself on a certain point, that point may be established by the testimony of *other* witnesses.

It is evident that if he had found that such right wheel order was given and executed, then Judge Clancy could not have exonerated the tows from fault in crowding the Rincon Hills off the Range and onto Dimond Reef.

The refusal of Judge Clancy to find the right wheel order which the Pilot of the Rincon Hills gave when he blew the danger signal is all the more surprising because the giving of such right wheel order was confirmed by the helmsman *at the Coast Guard hearing,* and again at the trial by the helmsman and the other witnesses above named. At the trial, *it was the counsel for the Metropolitan tow* who had the helmsman *confirm, on cross examination,* not only that the Rincon Hills' pilot gave a right wheel order when he blew the danger signal and that the helmsman carried it out, but that such right wheel order given by the Pilot and carried out by the helmsman *might even have been a hard right order* (516a-5, 516a-6), which would emphasize even more the fact that the Rincon Hills was forced off the Range and toward Dimond Reef in order to avoid collision.

6. As to the tows embarrassing the navigation of the Rincon Hills.

The opinion of the District Court (672a) asserts "The Rincon Hills never at any time navigated with respect to the Metropolitan tow. There was nothing in the conduct of the Long Branch tow that contributed in any way to the grounding."

As to the Metropolitan tow, the foregoing assertion by the Court below appears to be based primarily upon the Court's assertion that the master of the Rincon Hills, "never saw the Metropolitan float. If the master of the vessel

could not see Metropolitan then it means that tow was never in the picture." (675a)

The Court's conclusion that the Metropolitan tow was "never in the picture" is a complete *non sequitur*, because Captain Mullock, master of the Rincon Hills, was in the chart room and did not enter the wheelhouse until after Pilot Rowohlt had blown the alarm signal (108a). Captain Mullock testified that after entering the wheelhouse his attention was directed toward the Jersey Central tow, which was on the starboard bow of the Rincon Hills and angling across the bow of the tanker (105a). Captain Mullock *did not testify* that "he never saw the Metropolitan float". On the contrary, when pressed upon the point, Captain Mullock testified that he did have some recollection of seeing the Metropolitan tow (516a-4). Since the Metropolitan tow was ahead of the Jersey Central tow, it can be readily understood that the Metropolitan tow, when Captain Mullock came into the wheelhouse, had already crowded the Rincon Hills, with the result that the Jersey Central tow which still remained on the starboard bow of the Rincon Hills became quite naturally the primary object of Captain Mullock's attention.

As to the Jersey Central tow, the assertion by the Court below that there was nothing in the conduct of this tow that contributed in any way to the grounding of the Rincon Hills appears to be primarily based (677a) upon Judge Clancy accepting the testimony of Captain Molloy, of the tug Long Branch, notwithstanding the many errors and contradictions in his testimony, some of which are recorded even in the District Court's opinion.

In view of the fact that he did not see or hear a single witness testify, it is all the more surprising to find the statement made by Judge Clancy in his opinion (677a) "Molloy was a straightforward witness who gave direct responsive answers." As an effort to persuade the Circuit Court not

to reverse, by the inference that Judge Clancy was in a better position to pass upon the manner and content of Molloy's testimony, the statement must fail, because the Court of Appeals had before it the *very same* record as was before Judge Clancy. As an expression of view as to the manner and content of Molloy's testimony, the statement of Judge Clancy is seen to be inaccurate, because the record shows that Molloy was neither straightforward nor direct in his testimony. In fact his own testimony shows that the Jersey Central tow did embarrass the navigation of the Rincon Hills.

Thus, when he testified at the Coast Guard Investigation, Molloy stated that the Long Branch tow *cleared the Rincon Hills by only 70 feet*, and Molloy drew a diagram showing the relative positions of the tow and of the Rincon Hills as they cleared, such diagram being in evidence as Exhibit 70, and a reproduction attached hereto as Appendix F.

At the trial, Molloy sought to change his estimate of the distance by which the tow cleared the Rincon Hills, claiming that he had realized immediately after the Coast Guard hearing that *his 70 feet estimate was wrong* (413a), but admitting that he had done nothing to inform the Coast Guard in that respect (415a), even though he knew that the Coast Guard were concerned with his license and that of Pilot Rowohlt of the Rincon Hills (416a).

Molloy sought at the trial to increase the distance by which the Long Branch tow cleared the Rincon Hills to 200 or 175 or 150 feet (414a).

Not even this increase satisfied counsel for the tows, and on "cross-examination" counsel for the *Metropolitan tow* put the leading question that the Long Branch tow was in the middle of the distance between the Rincon Hills and the Manhattan Piers, with which suggestion *Molloy readily agreed* (516a-6—516a-9).

The District Court's opinion does not explain how or why Molloy's answer of 200 feet was accepted by Judge Clancy as the "straightforward", the "direct", the "responsive" answer.

It is wholly clear that the 200 feet estimate given by Captain Molloy at the trial as to the clearing distance between the Long Branch tow and the Rincon Hills cannot be relied upon, because on final cross-examination Molloy admitted that he could not remember the distance between the Long Branch and the Rincon Hills, or the distance between the Long Branch and the Manhattan piers—"whether there was more room on the starboardhand or on the port, I couldn't remember" (432a).

Accordingly, the best estimate which Molloy gave at any time was his 70 feet estimate given at the Coast Guard Investigation, and confirmed in his sketch, Exhibit 70, and such a small clearing distance shows beyond any doubt that the Long Branch *did* embarrass the navigation of the Rincon Hills. Even Molloy himself admitted that 70 feet was not enough room to maneuver (414a).

Captain Smith, Manager of respondent's Marine Department, was not told by Molloy that Molloy later believed that the 70 feet estimate he gave to the Coast Guard was not correct (453a). In fact Captain Smith accepted the *70 feet estimate* as being correct, and *continued at the trial to accept it as correct* (454a).

The testimony of *ten witnesses*, in addition to Captain Molloy, shows beyond doubt that both the Metropolitan tow and the Long Branch tow *did* embarrass the navigation of the Rincon Hills.

Pilot Rowohlt

> "Q. Captain Rowohlt, the last questions, in reply thereto you had placed the [redacted]els in their respective positions of the craft concerned at the time you blew the danger signal and stopped the Rincon Hills engines and ordered a right wheel.

Now, will you tell us, what did you do after you took that action, and how did the situation develop? A. Well, as we were progressing up towards the tows, tows were coming down, heading in a northwesterly direction, the both tows, and they were making about as much leeway as they were headway, and I was watching the bearings, changing the bearings, and it looked to me as though if I had stayed on the direct course or on the range that I had a risk of collision. (42a, 43a)

Captain Mullock

"Q. Now, Captain, can you tell me whether, if the helm had not been thrown either to the right or to the left, and if the engines had not been put full ahead at the time that you heard the first hard left, full ahead order given, but if the ship, the Rincon Hills had been kept amidships, or not it is your opinion that there would have been any grounding, under those conditions, of the Rincon Hills? A. I still consider she would have grounded, yes, under those conditions. That is, provided there was no movement made of the engine, and no movements made of the wheel, and the ship had continued losing her headway, and with the current setting on the shoal, I believe she would have grounded. It is my opinion that she would have grounded just the same.

Q. Well, if there had been no change of the rudder either to the right or to the left, if the engine had been put full ahead, then do you still say that there would have been a grounding of the Rincon Hills? A. I believe so, yes.

* * *

A. Yes, sir. She would have still gone on the reef in that case if she continued going ahead.

Q. So, then, as I understand the situation, from the time that you entered the pilothouse two minutes prior to the grounding, there was nothing that could have been done that would have saved the Rincon Hills from going on the reef; is that your testimony

A. Yes, sir, there could have been something done. We could have rammed down that barge and tugboat, possibly drowned a half a dozen men. If you would have wanted us to do that, why, you should have sent us prior orders to do it. (124a)

* * *

'cond Officer Richard

The Jersey Central tow cleared the Rincon Hills by such a small margin that the Watch Officer was expecting there would be a collision, and he was ready to take immediate action to assist persons in the water after collision. (516a-4, 615-5)

'urser Phillip

"Q. After you returned to your room what occurred next? A. I sat down at my desk again and started to count money once again. I had—just after I was seated I heard a scraping sound and then the ship lurched to starboard.

I immediately picked up my money again and ran out on deck. I looked over the side—well, as I ran out on deck people were shouting the ship was aground. My first impression was that we had come into collision with the tug and carfloat. That was the first thought I had when I felt the scraping sound.

Then I ran out on deck and heard people shouting that the ship was aground, and I saw oil coming out on the surface of the water. That was on the starboard side that I saw the oil.

I then ran across to the port side of the amidships deck and noticed that we had cleared the tug and carfloat, that we had not come into collision with the tug and carfloat." (162a)

Captain Henry Hoffman, Master of the Governors Island Ferry Lt.-Col. Robert E. Shannon.

"Q. When the ship blew the alarm signal was there anyone else with you in the pilothouse or on

the offshore end of your ferry? A. No, sir, there wasn't.

Q. Did you take any action as to calling anybody to you? A. Yes, sir. I rang the bell—we have a bell from one pilothouse to the other, which is a starting bell—and I immediately hit that four times for the quartermaster to look my way, that I want him. And when he came to the window where he could see me on the New York Pilothouse, I motioned to him to look at the mix-up that was going—about to happen, and he comes out on a little landing outside the pilothouse and stood there watching it the same as I did.

Q. Who was your quartermaster on this occasion? A. Captain Benjamin Parrillo.

Q. Now, did you continue to observe the various crafts you have mentioned? A. Yes, sir, I did.

Q. Will you tell us what happened as you observed it from the time that the ship blew the danger signal? A. Well, I looked at the situation and I figured right off the reel, the captain with the floats——

The Court: What was that?

Mr. Haight: Speak louder.

A. (Continuing) I figured the captain with the floats was going to cross the tanker's bow, and if he didn't get hit he was going to be mighty lucky, because they were very, very close; and when he crossed the tanker's bow I didn't think he was really going to do it.

The Court: You are talking about the top of the tug and the carfloat?

The Witness: Yes.

And just before he crossed the bow, the last thing I saw was part of a sandbarge in the same site as the tug, and I was wondering how he was ever going to do it." (70a, 71a)

Whelan, Quartermaster of the Ferry Ellis Island

"Q. After the Ellis Island ferry came in the position you described off the port quarter of the tanker, will you tell us what developed thereafter? A. We were proceeding along on our course, and I noticed this sand tow coming on down the East River, and this carfloat to the port side of the tow—how far off the tow I don't know—but toward the stern of the tow, and somebody called my attention to it that I had called Captain O'Toole's attention——

Mr. McKernan: I didn't get the name.

A. (Continuing) I had called Captain O'Toole's attention to the situation and referred to it as 'Watch this, Captain, this is going to be cute,' and we started then veering away from the tanker to make our landing in Slip 7." (82a)

* * *

Q. Will you tell us as you proceeded from first sighting the sand tow and carfloats up to the time when you angled for Slip 7, as you mentioned, did you have the tug and the sand tow scows in your vision all the time? A. When I first saw that they were to the port side of the ship up ahead, heading straight on out. When they started making their swing, that is when I mentioned to Captain O'Toole, 'Watch this,' that it is going to be cute.

Q. Are you referring to the sand tow or the carfloats now? A. *Both of them.* Both started swinging on down with the tide.

Q. Now, as you proceeded did you have the sand tow in your vision all the time? A. I had the sand tow in the vision all the time except possibly maybe half of the last scow was across the bow of the ship at one time I had noticed, and we had lost sight of the carfloat for possibly half a minute, and when we were angling from this here tanker, abaft of the wheelhouse of the tanker, we angled in to get away from that mess, then I no-

ticed this carfloat come shooting across the bow of the ship, and the last view I had of that close situation was that the tanker was heading directly amidship on the carfloat.

Q. Will you explain a little more what you meant when you said a moment ago that you lost sight of the carfloat? A. She had come in—being swept down with the tide, both the sand scows and the float, and at that position we were at I had lost sight of the float being swept down with the tide. I didn't know where he was going, whether he would possibly go on the starboard side of the ship or where he went. It was out of my view." (83a)

* * *

Q. When the carfloats came back in your vision again, what was their position relative to the tanker? A. They seemed to be 90-degree across the bow of that ship the way I seen it." (84a)

Captain Tuttle, master of the Staten Island Ferry, Gold Star Mother

"Q. Now, at the time you first saw the carfloat tow will you tell us whether or not you could also see the tanker? A. Yes, sir, I could.

Q. What was the relative positions of the tanker and the carfloat tow? A. They were very close. The carfloat tow was across the bow of the tanker at about a 45-degree angle.

Q. From which side of the tanker to which side of the tanker was the carfloat tow proceeding when you said she across the tanker bow? A. She was coming from the starboard side of the tanker toward the port side.

Q. Can you estimate the distance between the stem of the tanker and the carfloat when you first observed them in that position? A. It looked very close to me; I would say 20 or 30 feet, possibly, from that angle.

Q. I am speaking of the time when you first saw the carfloat tow in the position you have described.

Did you see any other craft? A. Yes, there was another tow ahead of the carfloat tow.

Q. What kind of a tow was this other tow? A. At this point I could not specifically say what the tow was.

Q. Can you tell us whether or not it was a hawser tow? A. It was a hawser tow, yes. (492a, 493)

* * *

Q. Will you tell us how the two tows and the Gold Star Mother proceeded from the position as shown in your diagram, sketch 111? A. How they proceeded?

Q. Yes. Don't mark the sketch. A. It squeezed in along the other tow, the hawser tow, and both proceeded up toward the North River.

Q. What side of the hawser tow was the carfloat tow on when it squeezed in in that way? A. It was on the port side of the tow.

Q. By that you mean the port side of the hawser tow? A. Of the hawser tow, correct." (498a)

Captain McConnell, on the tug William Meseck

"Q. When you first observed the Metropolitan sand tow whereabouts was she? A. She was coming from—starting over from about Pier 9, Brooklyn, headed for the New York shore.

Q. At that time did you see the Jersey Central tug and carfloats? A. Yes, sir, she was right around the stern of the Metropolitan.

Q. What was the relation as to position between the Jersey Central tug and tow and the Metropolitan tug and sand tow? A. Well, the Jersey Central was a little over to Brooklyn more and he was coming up alongside of the Metropolitan on his port side.

Q. On the port side of the Metropolitan tow. Did you observe what the Metropolitan tug was towing. A. Yes, I think it was three sand scows he had on a hawser.

Q. How were those sand scows made up? A. Strung out straight on a hawser.

Q. What was the relationship between the sand scows? A. One behind the other.

Q. At the time the Rincon Hills blew the alarm signal can you state what then was the position of the carfloat tow? A. Well, he was up a little ways, going, just about going across the bow of the ship, getting on the other side there.

Q. When you say going across the bow of the ship, will you state from which side of the ship he was crossing? A. He was going from starboard, going over to the port side, coming from Brooklyn, headed for New York.

Q. When you say from starboard, do you mean from the starboard side of the Rincon Hills? A. That is right." (184a, 185a)

Captain Hutton, of the tug Metropolitan No. 2

"Q. Captain, is it not a fact that the Jersey Central tug and carfloats overtook and passed your tug and tow 200 feet off your port side and between the Rincon Hills and your tow? A. That is right." (336a)

Captain Reichert, master of the tug Metropolitan No. 3

The statement of Capt. Reichert, given to his own counsel 17 days after the stranding, shows definitely that both the Metropolitan tow and the Jersey Central tow crowded the Rincon Hills. Capt. Reichert's statement also shows that the crowding of the Rincon Hills by the Jersey Central tow was promptly recorded in the statement of Capt. Reichert. While he did not directly acknowledge that the Metropolitan tow also crowded the Rincon Hills, this is to be expected. However the facts recorded in Capt. Reichert's statement speak for themselves, and as above noted, show that the Metropolitan tow most certainly did crowd the Rincon Hills. The Metropolitan No. 3 was following astern of the Metropoli-

tan tow and somewhat to her port. The Metropolitan No. 3 was also astern of the Jersey Central tow, but that tow was somewhat to port of the Metropolitan No. 3.

Captain Reichert's sworn affidavit contains (page 2) the following vital statement:

> "When I arrived about abreast of the tanker Rincon Hills, she ran aground on Dimond Reef. At this time I was about 150 yards off the Rincon Hills so that there was this much clear water between the port side of the Rincon Hills and the port side of the Metropolitan No. 3. At this time the tug Long Branch and her floats were ahead of me but off to my port."

Since the East River Range Line is 300 feet from Dimond Reef, Capt. Reichert's statement gives a definite fix of the positions of the two tows *at the very moment when the Rincon Hills grounded*. At that moment, the Metropolitan No. 3 was only 150 yards, or only 450 feet to the north of Dimond Reef. This puts the Metropolitan No. 3 on the wrong side of the channel between Dimond Reef and lower Manhattan, since the center line is 480 feet from Dimond Reef.

The Jersey Central tow, at the moment when the Rincon Hills grounded, was—in the words of Capt. Reichert—"ahead of me *but off to my port*". This puts the Jersey Central tow *on the Range line* or even closer to Dimond Reef.

The Metropolitan tow was a little to starboard of the Metropolitan No. 3, and therefore was about on the center line of the channel between Dimond Reef and lower Manhattan.

The vital significance of the foregoing positions, as established by the statement of Capt. Reichert, is that the Metropolitan tow and the Jersey Central tow were *still in the wrong part of the channel* at the very moment when the Rincon Hills stranded on Dimond Reef. Having been unable

to get over to the right part of the channel during the interval which elapsed between the Rincon Hills giving the danger signal and the tanker going aground, there can be no doubt that both tows crowded the Rincon Hills and embarrassed her navigation as they approached her and finally cleared her, only because of the avoiding action taken by the tanker.

That the tows *did* embarrass the navigation of the Rincon Hills is vividly shown by the fact that when the Jersey Central tow cleared the port bow of the Rincon Hills, Pilot Rowohlt, on the bridge of the Rincon Hills "hollered over to the Jersey Central and I—pretty strong language—I wanted to know *what he was trying to do, to run the ship ashore?*" (46a). Rowohlt did not receive any answer from those in the pilot house of the tug (46a).

While the foregoing testimony of Rowohlt was in restrained language, other witnesses revealed the "pretty strong language" to which Pilot Rowohlt referred in his testimony. Captain Mullock, with special permission from the Court, testified that Pilot Rowohlt hollered "You son of a bitch, what are you trying to do, put us on the rocks?" (113a); and this was confirmed by Second Officer Richard (152a). The clearance between the Rincon Hills and the Jersey Central tow was estimated at 10 feet (Henry Hoffman 72a; Edward Hoffman 98a); 10 to 20 feet (Whelan 92a); 20 feet (Rowohlt 44a); 20 to 25 feet (Richard 146a, 148a); 25 to 30 feet (Mullock 113a); 20 to 30 feet (Tuttle 493a); 30 feet (Kuinlivan 205a); 50 feet (Wilcox 201a); 70 feet (Molloy at Coast Guard Hearing 409a, and Exhibit 70).

The clearance between the Rincon Hills and the Metropolitan tow was estimated at 40 feet (Edward Hoffman 97a); 100 feet (Rowohlt 43a); to Henry Hoffmann, on the Ferry *Lt. Col. Robert E. Shannon*, it appeared that the Metropolitan tow and the Jersey Central tow were "in the same site" (71a).

APPENDIX B

Explanatory note and copy of Exhibit 8, Chart marked by Captain Rowohlt, Pilot of the Rincon Hills.

The enlarged chart used for this exhibit (48a) is an enlarged reproduction of the area comprising the lower part of Manhattan, the upper portion of Governors Island and the Brooklyn shore. The enlargement was made from Exhibit 1, U. S. Coast and Geodetic Survey Chart No. 745, of the Hudson and East Rivers, 10th Edition, August 13, 1951, corrected to November 19, 1951.

The markings on Exhibit 8 are those of Captain Alfred C. Rowohlt, Pilot of the Rincon Hills, who was conning the vessel at all the times in question (35a).

Pilot Rowohlt had brought the Rincon Hills up the Main Ship Channel to the West of Governors Island and had turned in towards the East River, or Deep Water, Range. The Range is located by lining up two lights on the Brooklyn shore; one on the end of Pier 11, marked "F R" and the other on a building behind Pier 9, marked "F G" (37a). The position of the Rincon Hills is shown by a pencil outline of the vessel marked (A). The Rincon Hills was slightly north of the Range Line to allow for the southward set of the current in the Hudson River.

When the Rincon Hills was in position (A), Pilot Rowohlt first saw the Metropolitan No. 2 and sand tows off Pier 9, East River, as shown on the upper section of the exhibit, and labeled as such. The Long Branch and her carfloats were behind the Metropolitan No. 2.

The Rincon Hills advanced to the position marked "Rincon Hills 1" (38a), at which time Pilot Rowohlt gave a one-blast signal on the whistle of the Rincon Hills. The corresponding position of the Metropolitan No. 2 at the time of the one-blast is designated as "Met 1" with her last scow on the Range line; the corresponding position of the Long

Branch is designated as "CRR 1", which at that time had the bow of her port carfloat on the Range line (39a). Neither tug answered the Rincon Hills' one-blast signal (40a, 48a).

The Rincon Hills proceeded to the position marked "R.H. 2" and then sounded the alarm signal (40a). The corresponding positions of the other craft are shown as "Met 2" and "CRR 2". The alarm was not answered by either tug.

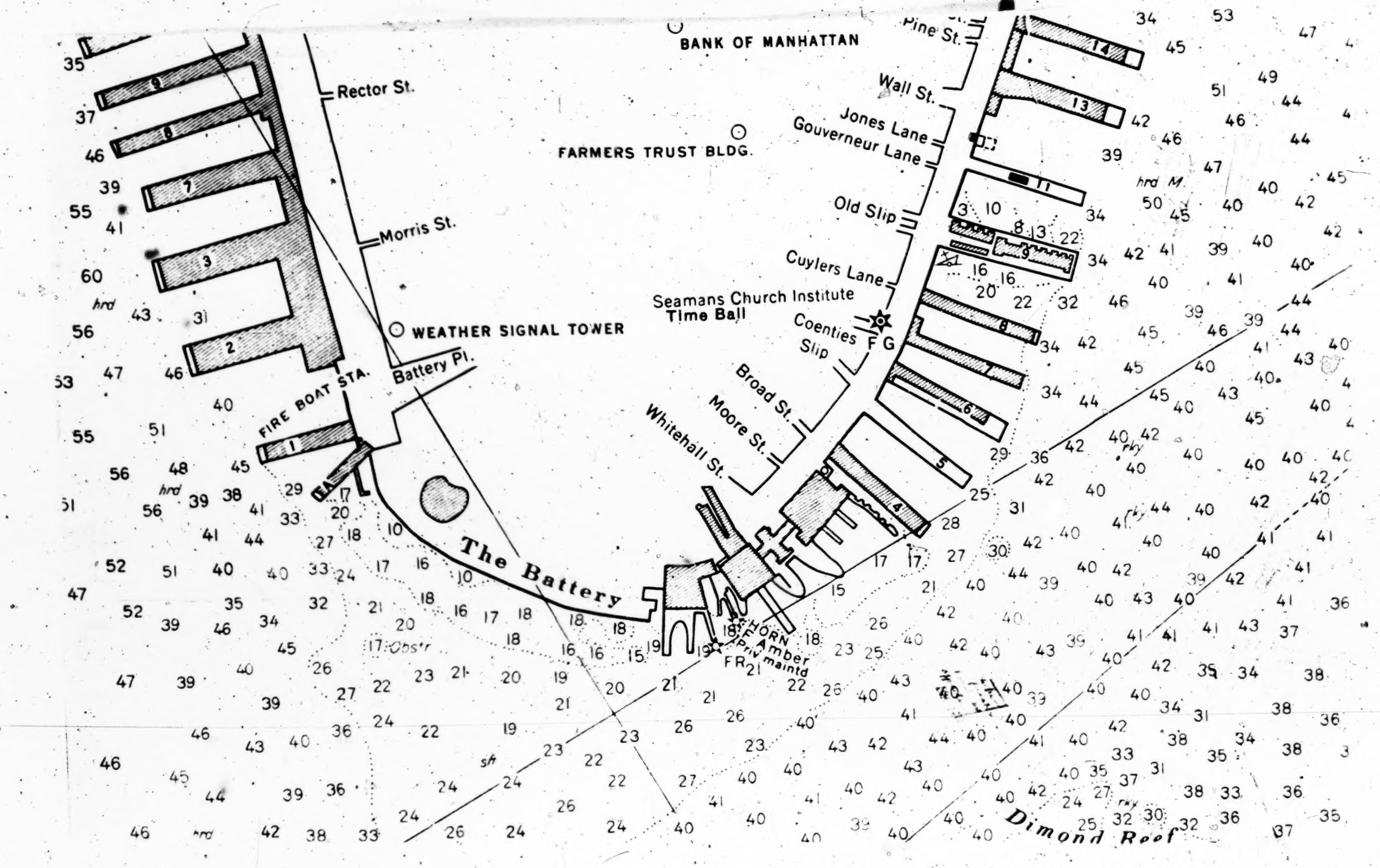
Pilot Rowohlt's estimated position of the Rincon Hills when aground is designated by the word "aground" on Dimond Reef. Actual bearings showing the final grounded position were plotted on Exhibit 36.

On cross-examination, working back from the estimated position aground, another outline of the Rincon Hills was marked to show the estimated position of the Rincon Hills and the Long Branch "When the pilot house (of the Long Branch) was opposite Bridge" of the tanker (50a).

Outside eye witnesses estimated that the Long Branch just barely cleared the Rincon Hills; 10 feet—Henry Hoffmann, (72a) and Edward Hoffman, (98a); 10 to 20 feet—Whelan, (92a); and, 20 to 30 feet—Tuttle, (493a).

A rough pencil curved line extends from near Pier 4, Manhattan, marked A, to a point off the old Ellis Island ferry slip, adjoining the Battery, marked B. This represents the area referred to by Pilot Rowohlt as "abeam the South Ferry area" (49a, 50a).

A rough pencil curved line extends above Governors Island, also marked A-B, to designate the northwest corner of Governors Island as referred to by Pilot Rowohlt.


BANK OF MANHATTAN
FARMERS TRUST BLDG.
WEATHER SIGNAL TOWER
Rector St.
Morris St.
Battery Pl.
FIRE BOAT STA.
The Battery
Pine St.
Wall St.
Jones Lane
Gouverneur Lane
Old Slip
Cuylers Lane
Seamans Church Institute
Time Ball
Coenties Slip
Broad St.
Moore St.
Whitehall St.
HORN
Amber
Priv maintd
FR21
Dimond Reef

BANK OF MANHATTAN

ERS TRUST BLDG.

Pine St.

Wall St.

Jones Lane

Gouverneur Lane

Old Slip

Cuylers Lane

Seamans Church Institute

Time Ball

Coenties Slip

F G

Broad St.

Moore St.

Whitehall St.

HORN
Amber
Priv maintd
FR 21

Cranberry St.

Orange St.

Pineapple St

Clark St.

Furman St.

F G

F R

Joralem

State

Atlantic

14 13 11 9 6 5 4

3 10 8 13 22 16 16 20 22 32

6 6

6 8 9 9½ 10 11 12 15 16 17 18

Diamond Reef

HORN

Ventilator

TANK

GOVERNORS ISLAND

GOVERNORS ISLAND 12 HORN 2 FR

Nautical Mile

0 ½

Yards

100 0 500

Dimond Reef

GOVERNORS ISLAND

HORN

Ventilator

TANK

2FR

Nautical Mile

Yards

0 500 1000

CHANNEL

Irving St.

Cable

Van Brunt St.

Sedgewi

Degraw

Sacke

FG 94 ft vis 15 m

Uni

Pre

Ca

Sumn

Hamil Ave.

APPENDIX C.

Explanatory note and copy of Exhibit 14, Chart marked by Captain Henry G. D. Hoffmann, Master of the Governor's Island Ferry *Lt. Col. Robert E. Shannon.*

The enlarged chart used for this exhibit (75a) is an enlarged reproduction of the area comprising the lower part of Manhattan, the upper portion of Governors Island and the Brooklyn Shore, made from Exhibit 1, in the same manner as that used for Exhibit 8.

The markings on the exhibit are those of Captain Henry G. D. Hoffmann, master of the Governor's Island ferry *Lt. Col. Robert E. Shannon.*

The ebb tide route of the ferry from Manhattan to Governor's Island is marked in a heavy curved line drawn in pencil (55a, 56a).

Captain Hoffmann was aboard the ferry in her Manhattan slip and was about to navigate the ferry from the Battery to Governor's Island on the 12:15 trip. This position of the ferry in her Manhattan slip is marked "G. I. Ferry 1" (58a, 59a). At this time Captain Hoffmann saw the Rincon Hills in the approximate position marked "Tanker 1" (61a), which appears on the lower right section of Exhibit 14; a Meseck tug (C. Hayward Meseck) was off the Battery (60a); the Metropolitan No. 2 and the sand tow were sighted in the center of the East River, about off Pier 6, Manhattan, in the approximate position marked "Sand Tow 1", which is on the upper section of the exhibit (61a). Captain Hoffmann did not see the Long Branch at that time, as it was apparently up-stream behind the scows and out of his line of vision.

Thereafter the ferry left the Battery en route to Governor's Island. When the ferry was in a position approximately half-way across and on the Range line, marked

"G. I. Ferry 2"; Captain Hoffmann saw the Rincon Hills north of the Range line and headed in a general easterly direction, in the approximate position marked "Tanker 2"; and at that time he saw that the Metropolitan. No. 2 and her sand scows had been swept down stream across and center of the deep water channel, this position of the Metropolitan tow being marked (65a) Sandtow 2, with the last scow south of the Range line and the center scow on the Range line itself (64a, 65a).

The ferry continued across and docked in her slip on Governor's Island. This position marked "G. I. Ferry 3". The Rincon Hills, at that time, was on the range line in an approximate position marked "Tanker 3". It was at this time and in this position that Captain Hoffmann heard the Rincon Hills sound a single blast. The Metropolitan No. 2 (Captain Hutton admits (310a) hearing the signal and not replying, continued to be swept down by the ebb current out of the East River and at the same time was counteracting the current by pulling towards the Manhattan Ferry slips, as shown by "Sand Tow 3" (66a).

The position, at this time, of the Jersey Central tug Long Branch with a carfloat on each side is marked "CRR 3" (68a) and appears just below the word "Dimond". The Long Branch was well below the Range line and heading across the bow of the Rincon Hills. The Long Branch appeared to have been coming out of Buttermilk Channel. Another outside witness, Captain Tuttle made the same observation (502a).

Positions numbered 4 were observed by Captain Hoffmann from the forward end of his ferry, which was still in her Governor's Island slip. The Rincon Hills had just blown the alarm. Captain Hoffmann saw the Rincon Hills in the position marked "Tanker 4". The Metropolitan No. 2 and scows, and the Long Branch and carfloats had reached the positions marked "Sandtow 4" and "CRR 4" respectively.

Upon cross-examination, an outline was marked on the exhibit, across the face of Dimond Reef, to show where Captain Hoffmann approximated the Rincon Hills position when aground.

Estimates of the velocity of currents are as given upon cross-examination and are marked in numbers at various points along the ferry's route.

Pencil letters "T" and "X" with arrows appear at the Northeastern Edge of Dimond Reef, to denote a split in the tide or current. some of which flows down Buttermilk Channel and some down the deep water channel.

The positions of the various vessels marked "Tanker 1", "Sand Tow 1" etc. were based upon Captain Hoffmann's observations by eye in relation to the East River Range and the shore line.

On cross-examination Captain Hoffmann was asked to estimate the distance in feet between the Rincon Hills and Governors Island. Then, the exact distance estimated by him was laid off on the chart and marked "Tanker 5" and "Tanker 6".

The chart bears a label "2nd Stone wall of Ellis Island Ferry (rack)". The slip was not being used by the Ellis Island Ferry at the time. The Ellis Island Ferry was using slip 7 (written in pencil just west of Pier 4, East River). When inverted, the "7" appears to be a "6".

Lines A-B and C-D in heavy pencil, were drawn upon cross-examination, and then distances were measured.

The above came about when Captain Hoffmann said that the Metropolitan No. 2 and sand scows in positions 2, 3 & 4 were drawing closer to the pier ends (75a). Mr. Hanan arbitrarily picked out the East-West parallel (75a) and said, "That gives us a good straight line to the ends of the piers * * *" (75a), and then he measured distance at right angles *to the East-West parallel* and not *ahead* in the manner the tug and scows were proceeding as affected by a

southwesterly current (76a). Actually, the East-West parallel does *not* run parallel to a line drawn through the end of Pier 4 and the end of the Staten Island ferry long rack; nor does it run parallel to the line of the East-River Range.

The actual course made good by the Metropolitan tow over the ground was plotted by Captain Dwyer on Exhibit 56.

Court
of N. Y.
MAR 16 1955

Rector St.
Morris St.
Battery Pl.
Pine St.
Wall St.
Jones Lane
Gouverneur Lane
Old Slip
Cuylers Lane
Coenties Slip
Broad St.
Moore St.
Whitehall St.
BANK OF MANHATTAN
FARMERS TRUST BLDG.
WEATHER SIGNAL TOWER
FIRE BOAT STA.
Seamans Church Institute
Time Ball
The Battery
Obstr'd
Dimond Reef

BANK OF MANHATTAN

UST BLDG.

Pine St.

Wall St.

Jones Lane

Gouverneur Lane

Old Slip

Cuylers Lane

Seamans Church Institute

Time Ball

Coenties Slip

F G

Broad St.

Moore St.

Whitehall St.

Harbor Anchorage

FR

Diamond Reef

Cranberry St.

Orange St.

Pineapple St

Clark St.

Furman St.

F G

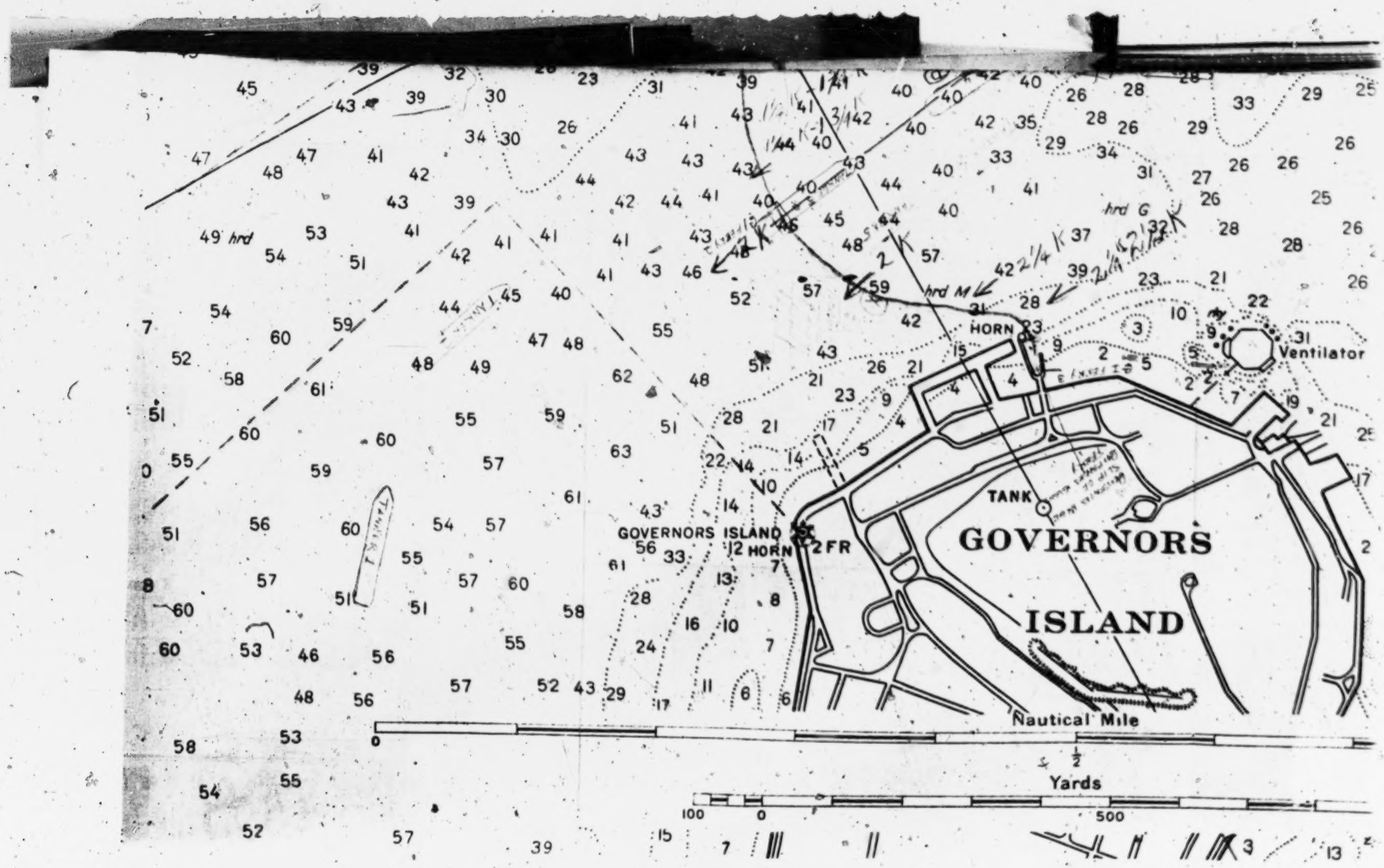
F R

Pierre

Joralem

State

Atlantic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APPENDIX D

Copy of Exhibit BBB, sworn statement given to Metropolitan counsel by Captain Hutton, of the tug Metropolitan No. 2, only 17 days after the grounding of the Rincon Hills.

Amended Statement of CHARLES HUTTON

Master of the Tug METROPOLITAN NO. 2

Dated NOVEMBER 26, 1951

STATE OF NEW YORK,
COUNTY OF NEW YORK, } SS.

CHARLES HUTTON, being duly sworn, deposes and says: That at all times hereinafter mentioned he was master of the tug METROPOLITAN NO. 2, which at all times hereinafter mentioned was in all respects tight, strong, staunch and seaworthy and properly manned and equipped.

On November 26, 1951 the M/T METROPILITAN NO. 2 left stakeboat #2 off College Point with three loaded scows in tow bound for stakeboat #1 off the Statue of Liberty. The METROPOLITAN NO. 2 had out two hawsers approximately 15 fathoms in length. The scows were made up tandem fashion one behind the other. I do not recall at this time their exact order, but I had in tow the loaded scows GG-202, GG-104 and GG-150. These scows are approximately 112 feet long and while in tow are made up close to each other bow and stern.

The METROPOLITAN NO. 2 and her tow proceeded from stakeboat #2 down the East River without incident. After passing below the Brooklyn Bridge the tow was favoring the middle of the river and when the tow was about off Pier 9, New York I observed a tanker, which later proved to be the HINCON HILLS. I should judge that this tanker at that time was about abeam of the light on the northerly end of Governors Island and approximately 1000

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feet off the light. The METROPOLITAN NO. 2 and her tow continued down the river and when approaching or in the vicinity of Pier 5 we began to pull in toward South Ferry so as to be in a position to round the Battery. This was about 1:00 p.m. on November 26, 1951, with the weather clear, a light northwest wind that had no effect on the navigation of my tow and the tide in the East River was just about low water slack. The tide was still running ebb out of the North River and in order to make proper allowances for the North River tide we pulled in towards the Battery when going by so that we would not be set down too much by the North River tide. The METROPOLITAN NO. 2 proceeded along without incident and when the tow was approximately 300 or 400 feet off of Pier 4, New York I heard the tanker RINCON HILLS sound a one-whistle signal. The tanker at this time was between the Battery and Governors Island and apparently swinging to her right in order to make the necessary turn and to get on the East River deep water range. Due to the position of the tanker and the METROPOLITAN NO. 2 I knew this signal was not meant for the METROPOLITAN NO. 2 and looked around to see for what vessel the signal was intended. I observed the tug LONG BRANCH with a carfloat on each side up off Pier 9 and out in about the center of the river bound down the river and concluded that the tanker RINCON HILLS was signalling to the tug LONG BRANCH. I do not recall at this time whether or not the tug LONG BRANCH sounded any signal in reply.

The tug METROPOLITAN NO. 2 continued on her way and an Ellis Island ferryboat bound from Ellis Island to the Battery passed a couple of hundred feet off my starboard side when I was

about off the ferry slips. It was not necessary for the Ellis Island ferryboat or the METROPOLITAN NO. 2 to sound any signals to carry out this passage as our courses and distances apart made it perfectly safe for us to pass without making any passing agreement. The METROPOLITAN NO. 2 continued on and when about 400 or 500 feet off the St. George ferry rack which has a siren on the end, the tanker RINCON HILLS was off to the port side of the tail end of my tow. I should judge that there was at least 600 feet between the port side of my tow and the port side of the RINCON HILLS. There was plenty of room for us to pass each other and the METROPOLITAN NO. 2 in no way interfered with the navigation or the course of the RINCON HILLS. The tug LONG BRANCH continued on down the river and overtook the tug METROPOLITAN NO. 2 and her tow and passed us on our port side. She passed about a distance of 200 feet off our port side and between the RINCON HILLS and the tow of the METROPOLITAN NO. 2.

The METROPOLITAN NO. 2 continued on towards stakeboat #1 and when well beyond the Battery and over toward stakeboat #1 the tug METROPOLITAN NO. 3 arrived alongside my tow and took a scow out of the tow to deliver it to destination. The METROPOLITAN NO. 2 continued on without incident to stakeboat #1 off Liberty Island.

After the aforesaid occurrences I heard the man who was apparently the pilot on the RINCON HILLS and whose name, I believe, is Woodhall or Woodhull and is master of the tug MILLIAM MESECK, which tug was following the tanker up the harbor but not made fast to the tanker, call his office and broadcast over the

air that the tanker RINCON HILLS had gone aground on Diamond Ke and the reason for her going aground was that the wheelsman or quartermaster put the wheel of the tanker the wrong way, putting it to the right, with the result that the tanker ran aground. I also heard Eddie Hoffman, the captain of the tug C. HAYWOOD MESECK, which was waiting off the Battery for the RINCON HILLS, cut in and state that the tug METROPOLITAN NO. 2 with three scows in tow and the tug LONG BRANCH with two carfloats in tow were in the vicinity.

The METROPOLITAN NO. 2 in no way interfered with or crowded the tanker RINCON HILLS and at all times was at a safe distance away from the RINCON HILLS.

SWORN to before me this :
13th day of December, 1951. :

Capt Charles Hutt

Elizabeth Soffel

ELIZABETH SOFFEL
Notary Public for the State of New York
Qualified in [illegible]

County Clk. No. [illegible]
Clerk's No. [illegible]
County Cls. & Ltd. [illegible]
Commission Expires March 30, 1953

3

APPENDIX E

Copy of Exhibit YY, sworn statement given to Metropolitan counsel by Captain Reichert, of the tug Metropolitan No. 3, only 17 days after the grounding of the Rincon Hills.

Recorded Statement of ALBERT REICHERT
Master of the M/T METROPOLITAN NO. 3
Dated NOVEMBER 26, 1951

STATE OF NEW YORK,
COUNTY OF NEW YORK, } SS.

ALBERT REICHERT, being duly sworn,

deposes and says: That at all times hereinafter mentioned he was master of the M/T METROPOLITAN NO. 3.

On November 26, 1951, at about 1:00 p.m., I was proceeding down the East River from stakeboat #2 off College Point as I had orders to take a scow out of the tow of the tug METROPOLITAN NO. 2 in the vicinity of the Battery and take the scow up the North River.

At about 1:00 p.m. I observed the tug METROPOLITAN NO. 2 with her tow of three loaded scows made up tandem fashion proceeding down the East River and in toward the Staten Island ferry slips. I also observed the tanker RINCON HILLS which at this time appeared to me to be to the south of the Battery, but up above the East River deep channel ranges. I should judge that the tug METROPOLITAN NO. 2 and her tow were proceeding about 300 or 400 feet off the pier ends and I also observed the tug LONG BRANCH coming down the East River with two carfloats in tow one on each side. The LONG BRANCH proceeded to overtake and pass the METROPOLITAN NO. 2 on the METROPOLITAN NO. 2's port side. The tanker RINCON HILLS was heading so as to proceed toward the East River deep channel ranges and apparently to get in a position to

LH:IB

turn and go up the East River. The METROPOLITAN NO. 2 and her tow proceeded down the St. George ferry racks on her way to stakeboat #1 and I was proceeding along about 500 feet to the stern of the METROPOLITAN NO. 2's tow but to her port or further out in the river than the METROPOLITAN NO. 2 was. When I arrive about abreast of the tanker RINCON HILLS she ran aground on Diamond Reef. At this time I was about 150 yards off the RINCO HILLS so that there was this much clear water between the port side of the RINCON HILLS and the port side of the METROPOLITAN NO. 3. At this time the tug LONG BRANCH and her floats were ahead of me but off to my port.

I notice that when the tug LONG BRANCH and her float came down and were passing around the Battery that the stern en of this tow was swinging somewhat toward the course of the RINCON HILLS, but I estimate that there was a clearance of abo 200 feet between the stern of the LONG BRANCH's tow and the RINCON HILL when they passed each other.

After the RINCON HILL ran aground on Diamond Reef I heard them broadcasting over the telephone that the ship had run aground and was about four feet out of water at the bow. I also heard them report that the RINCON HILLS went aground because the wheelsman put the wheel the wrong way and apparentl had put the wheel to the right instead of to the left. Later I again heard the Merrick's tugs telephone and at that time they reported that the tug METROPOLITAN NO. 2 and her tow were in t vicinity and that the tug LONG BRANCH and her tow were also in

the vicinity and that this latter tow crowded the RINCON HILLS somewhat.

From what I observed of the navigation of the METROPOLITAN NO. 2 she at no time and in no way interfered with the navigation of the RINCON HILLS and at no time did she come close enough to the RINCON HILLS to either crowd her or cause her to change her course in any way.

SWORN to before me this 13th day of December, 1951.

Albert Beaubert

Elizabeth Soffel

ELIZABETH SOFFEL
Notary Public
Queens
County Clk. &
County Clk. &
County Clk. &
Commission Expires March 30, 1953

APPENDIX F

Copy of Exhibit 70, diagram drawn by Captain Coleman L. Molloy, of the tug Long Branch, at Coast Guard Investigation.

APPENDIX G

Copy of Exhibit 74, which is a reproduction of Exhibit 70 with additional markings made at the trial by Captain Coleman L. Molloy, of the tug Long Branch.

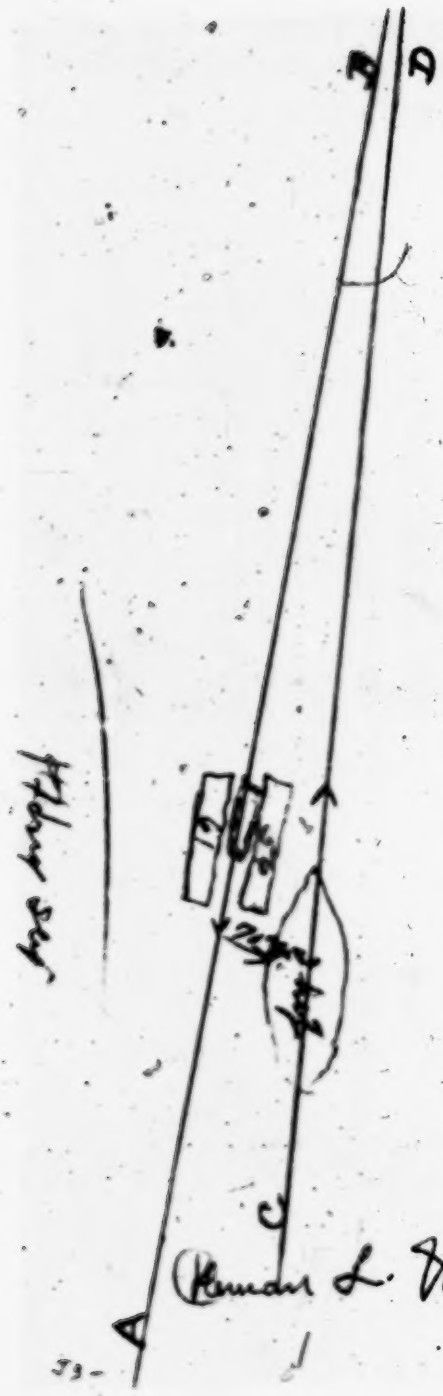

EXHIBIT
U. S. Dist. Court
S. D. of N. Y.
MAY 1955
ADM

LE COPY

Supreme Court of the United States

OCTOBER TERM, 1958

No. 564

METROPOLITAN SAND & GRAVEL CORPORATION, as owner of the Tugs METROPOLITAN No. 2 and METROPOLITAN No. 3, and the Sand Scows, G-G 202, G-G 150 and G-G 101,

Petitioner,

against

DEEP SEA TANKERS, LIMITED, as owner of the s/t RINCON HILLS, and as bailee of the cargo laden thereon, and SHELL OIL COMPANY, INCORPORATED, as charterers of said vessel,

Respondents.

REPLY BRIEF OF PETITIONER, METROPOLITAN SAND & GRAVEL CORPORATION TO THE BRIEF OF RESPONDENTS IN OPPOSITION TO THE CROSS-PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

LEO F. HANAN,
CHARLES J. CARROLL, JR.,
Counsel for Petitioner,
99 John Street,
New York 38, N. Y.

Rowne & Co., Inc., 163 Front Street, New York 38

Supreme Court of the United States

OCTOBER TERM, 1958

No. 564

METROPOLITAN SAND & GRAVEL CORPORATION, as owner of the Tugs METROPOLITAN No. 2 and METROPOLITAN No. 3, and the Sand Scows G-G 202, G-G-150 and G-G 104,

Petitioner,

against

DEEP SEA TANKERS, LIMITED, as owner of the s/t RINCON HILLS, and as bailee of the cargo laden thereon, and SHELL OIL COMPANY, INCORPORATED, as charterer of said vessel,

Respondents.

REPLY BRIEF OF PETITIONER, METROPOLITAN SAND & GRAVEL CORPORATION, TO THE BRIEF OF RESPONDENTS IN OPPOSITION TO THE CROSS-PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

In response to the cross-petition of Metropolitan Sand & Gravel Corporation, Deep Sea Tankers, Limited has filed in opposition a 17 page brief together with an appendix of some 52 pages replete with both excerpts from the testimony and argumentation based on such excerpts. The argument of Deep Sea Tankers, Limited is directed exclusively at the shoring-up of the opinion of the Court of Appeals with respect to its factual divergences from the findings of the District Court. The assertion is thus implicitly made that if the factual determination of the Court of Appeals is thus sustained, then the cross-petition of Metropolitan must fall.

This basic assumption, it is submitted, is entirely erroneous and does not answer the question of law presented, i.e., "whether the Court of Appeals under the standards applied reached the proper result, as to liability, on findings made by it."

Assuming but not conceding each and every factual conclusion made by the Court of Appeals and re-asserted now by the respondents, then petitioner Metropolitan contends that the Tug *Metropolitan No. 2* is without liability.

The Court of Appeals found that the length of the carfloats was 291 feet each (Cross-Petitioner's App. 19a) and that "we have two long, unwieldly tows, one immediately behind the other and in a position to pass to port of the first tow, the intervening distance between the two being 100 feet or so, crossing the bow of the tanker on a westerly or northwesterly course, at a point where the tanker is already south of the Range" (Cross-Petitioner's App. 28a). The Court of Appeals repeated later "we have already found that they (referring to the two tows) were about 100 feet apart as they crossed the tanker's bow" (Opinion Cross-Petitioner's App. 33a, matter in parenthesis ours), and that "As the two tows proceeded downstream the Railroad carfloats gradually came closer and closer to the sand tow, intending to pass to port of the sand tow; and the carfloats did pass to port of the sand tow, the actual passing taking place after the carfloats went under the bow of the *Rincon Hills*" (Opinion Cross-Petitioner's App. 20a) and "that the two tows were a good ship's length and a half away when he (referring to the pilot) sounded the alarm; that two minutes elapsed between the sounding of the alarm and the grounding: He (referring to the pilot) said he could not bear to port because of the presence of the sand tow • • •" (Opinion Cross-Petitioner's App. 35a, matter in parenthesis ours).

The *Rincon Hills* was 523.5 feet in length (Opinion Cross-Petitioner's App. 18a).

Attached to the brief of respondents in opposition is a chart drawn by the said pilot which demonstrates the finding and shows the position of the *Rincon Hills* at the sounding of the alarm (labeled RH 2) to be in the line of but not yet up to the Range; and also shows the tow of the *Metropolitan No. 2* (labeled MET 2) to have already cleared the Range (Respondents' Brief in Opposition App. 3b).

Accordingly, it is obvious that since The Central Railroad Company of New Jersey tow was astern of the Metropolitan tow and to its port, there existed more than ample passing distance between the Metropolitan tow and the *Rincon Hills* at the time "the stem of the tanker missed the the stern of the port carfloat by the narrowest of margins" (Opinion Cross-Petitioner's App. 23a, 24a), which space the *Rincon Hills* was unable to use because of the sole actions of The Central Railroad tug. Since the *Rincon Hills* actually passed The Central Railroad tug and only grounded after a wrongly executed wheel maneuver, it is beyond question that if The Central Railroad tug was not in the vicinity no grounding would have occurred. No finding was ever made by the District Court or the Court of Appeals that the actions of the Metropolitan tow alone would have or could have caused the *Rincon Hills* to ground. Indeed, the position of Deep Sea Tankers, Limited, as indicated in the paragraph above, squarely negates that contention.

How then did the Court of Appeals reach the erroneous conclusion that there was liability upon the part of the Metropolitan tug?

It is apparent that the Court of Appeals in its decision considered the actions of both tows jointly and charged the Metropolitan tug with the faults of the Central Railroad of New Jersey holding it jointly responsible for acts over which it had no control. In doing so, Metropolitan contends that the Court of Appeals applied an

erroneous standard of law with respect to its factual conclusion.

If The Central Railroad of New Jersey tug was at fault in following and attempting to pass the Metropolitan tow to its port and thus crowding the *Rincon Hills*, the onus should fall squarely and solely upon The Central Railroad tug. That the Metropolitan tow were the overtaken vessels is unchallenged. She owed to the *Rincon Hills* a duty with respect to her own navigation; she owed to the *Rincon Hills* no duty with respect to the navigation of the overtaking tow of the Central Railroad of New Jersey. No signals were exchanged between the tows and Metropolitan did not consent to or acquiesce in the navigation of the carfloat tow. Once the Metropolitan tow had cleared the range in sufficient time to allow the *Rincon Hills* the use thereof its duty to the tanker was completely discharged. In creating a relationship between the actions of the overtaking vessels, The Central Railroad tow, and the legal liability of the Metropolitan tow, the Court of Appeals has invoked a legal standard completely unsupported by any case, rule or statute and in complete disharmony with any concept of justice.

Lastly.

It is respectfully submitted the Court of Appeals did not reach the proper result as to liability, on the findings made by it; the question of limitation was never properly reached, and it is prayed that this Court exercise its proper right of supervision to correct a decision which is plainly wrong and in truth represents a miscarriage of justice.

Leo F. Hanan,
Charles J. Carroll, Jr.,
Counsel for Petitioner.